Supreme Court, U.S.
FILED

981557 JAN 26 1999

OFFICE OF THE CLERK

No. _____

In The

Supreme Court Of The United States

October Term, 1998

SAMAD SALEHPOUR,

Petitioner,

vs.

UNIVERSITY OF TENNESSEE, JOSEPH E. JOHNSON, WILLIAM R. RICE, WILLIAM F. SLAGLE, in their official and individual capacities; WILLIAM F. BOWLES, III, VICTOR A. FLETCHER, DENIS P. LYNCH, JOE M. GOSS, MARK R. PATTERS, MORRIS L. ROBBINS, JIMMY E. ALBRIGHT, HARRY K. SHARP, ROLF G. BEHRENTS, RUSSELL GILPATRIC, HARRY H. MINCER, BEN R. HIPP, MARJORIE A. WOODS, CHARLES SMITH, ROBERT G. KEIM, VAN T. HIMEL, in their individual capacities; and BETTIE T. PUCKETT, in her official and individual capacities,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

CONNIE WESTBROOK
Counsel of Record
147 Jefferson Ave., Suite #200
Memphis, Tennessee 38103
(901) 527-8339
Attorney for Petitioner

1688

QUESTIONS PRESENTED

I.

What notice and opportunity for hearing is required to be given to the parties when a district court decides to convert a motion to dismiss to one for summary judgment or where summary judgment is granted without a motion being filed, what constitutes "harmless error" when a court grants such motions for summary judgment and what standard of review should the appellate courts apply to such motions for summary judgment.

II.

What due process must a public university student be afforded before disciplinary penalties can be imposed.

PARTIES TO THE PROCEEDING

Mr. Samad Salehpour is the Plaintiff in the District Court and the Appellant in the Sixth Circuit Court of Appeals.

The Defendants in the District Court and the Appellees in the Sixth Circuit Court of Appeals are as follows: The University of Tennessee is a public university operated by public tax monies in addition to student tuition, Joseph E. Johnson is President of the University of Tennessee, William R. Rice is Chancellor of the University of Tennessee, Memphis, William F. Slagle is Dean of the College of Dentistry, Bettie T. Puckett is Director of the Affirmative Action Office, (Johnson, Rice, Slagle and Puckett are sued in their official and individual capacities), William F. Bowles, III, Victor A. Fletcher, Denis P. Lynch, Joe M. Goss, Mark R. Patters, Morris L. Robbins, Jimmy E. Albright, Harry K. Sharp, Rolf G. Behrents, Russell Gilpatric, Harry H. Mincer, Ben R. Hipp, Marjorie A. Woods, Charles Smith, Robert G. Keim, Van T. Himel. (Bowles, Fletcher, Lynch, Goss, Patters, Robbins, Albright, Sharp, Behrents, Gilpatric, Mincer, Hipp, Woods, Smith, Keim and Himel are sued in their individual capacity.)

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
A. Complaint	3
B. Motion to Dismiss or For Summary Judgment	5
C. District Court Ruling	8
D. Sixth Circuit Ruling	11
Reasons for Granting the Writ	14
I. The Petition Should Be Granted Because The Circuits Are In Conflict With What Notice Is Required When A District Court *Sua Sponte* Grants Summary Judgment	14
II. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings On The Requisite Elements Of Due Process	21
Conclusion	25

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Angel v. Williams, 12 F.3d 786 (8th Cir. 1993) 19

Bank Melli Iran v. Pahlavi, 58 F.3d 1406 (9th Cir. 1995) 19

Barron v. Reich, 13 F.3d 1370 (9th Cir. 1994) 15

Batterton v. Francis, 432 U.S. 416 (1977) 21

Blue Circle Cement v. Board of County Com'rs., 27 F.3d 1499 (10th Cir. 1994) 19

Board of Curatores v. Horowitz, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) 23

Bohac v. West, 85 F.3d 306 (7th Cir. 1996) 18

Burrick v. Edward Rose & Sons, 18 F.3d 514 (7th Cir. 1994) 18

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) 14

Chaparro-Febus v. Local 1575, 983 F.2d 325 (1st Cir. 1992) 15

Chrysler Corp. v. Brown, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979) 21

Cooperative de Ahorro y Credito Aguada v. Kidder, 993 F.2d 269 (1st Cir. 1993) 15

Copeland v. Machulis, 57 F.3d 476 (6th Cir. 1995) ... 13

Contents

	Page
Corso v. Creighton University, 731 F.2d 529 (8th Cir. 1984)	22
David v. City and County of Denver, 101 F.3d 1344 (10th Cir. 1996)	19
Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975)	18
Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961)	23
Eliasen v. Intel Corp., 82 F.3d 731 (7th Cir. 1996)	18
Estate of Smith v. Tarrant County Hosp. Dist., 691 F.2d 207 (5th Cir. 1982)	17
Fleischfresser v. Directors of School Dist. 200, 15 F.3d 680 (7th Cir. 1994)	18
FLLI Moretti Cereali v. Continental Grain Co., 563 F.2d 563 (2nd Cir. 1977)	16,17
Gay v. Wall, 761 F.2d 175 (4th Cir. 1985)	17
Gibb v. Scott, 958 F.2d 814 (8th Cir. 1992)	19
Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)	23
Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)	23
Gutwein v. Roche Laboratories, 739 F.2d 93 (2nd Cir. 1984)	16

Contents

Page

Hays v. Jefferson, 688 F.2d 869 (6th Cir.), *cert. denied*, 459 U.S. 833, 103 S.Ct. 75, 74 L.Ed.2d 73 (1982)... 13

Hilfirty v. Shipman, 91 F.3d 573 (3rd Cir. 1996) 17

In Re Professional Coatings (N.A.), Inc., 210 B.R. 66 (Bkrtcy.E.D.Va. 1997) 17

In Re Rothery, 143 F.3d 546 (9th Cir. 1998) 19

Jones v. Automobile Ins. Co. of Hartford, Conn., 917 F.2d 1528 (11th Cir. 1990) 20

Kennedy v. Empire Blue Cross and Blue Shield, 989 F.2d 588 (2nd Cir. 1993) 15,16

Kistner v. Califano, 579 F.2d 1004 (6th Cir. 1978).. 18

Kopec v. Coughlin, 922 F.2d 152 (2nd Cir. 1991) ... 15

Layton v. U.S., 919 F.2d 1333 (8th Cir. 1990) 19

Leach v. Shelby County Sheriff, 891 F.2d 1241 (6th Cir. 1989) 13

Massey v. Congress Life Ins. Co., 116 F.3d 1414 (11th Cir. 1997) 19

Matter of Hailey, 621 F.2d 169 (5th Cir. 1980) 17

Miller v. Glanz, 948 F.2d 1562 (10th Cir. 1991) 19

Nowlin v. Resolution Trust Corp., 33 F.3d 498 (5th Cir. 1994) 17

Penebscot Indian Nation v. Key Bank of Maine, 112 F.3d 538 (1st Cir. 1997) 15

Contents

	Page
Powell v. U.S., 849 F.2d 1576 (5th Cir. 1988)	17
Fleischfresser v. Directors of School Dist. 200, 15 F.3d 680 (7th Cir. 1994)	18
Resolution Trust Corp. v. Ruggiero, 994 F.2d 1221 (7th Cir. 1993)	18
Resolution Trust Corp. v. Sharif-Munir-Davidson Dev. Corp., 992 F.2d 1398 (5th Cir. 1993)	17
Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976)	13
Rose v. Bartle, 871 F.2d 331 (3rd Cir. 1989)	17
Salehpour v. University of Tennessee, 159 F.3d 199 (6th Cir. 1998)	1
Scottish Air Int'l. v. British Caledonian Group, 945 F.2d 53 (2nd Cir. 1991)	16
Selva & Sons, Inc. v. Nina Footwear, Inc., 705 F.2d 1316 (1983)	20
Stella v. Town of Tewksbury, 4 F.3d 53 (1st Cir. 1993).	15
United States v. Olano, 507 U.S. 730, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)	14
Williams v. City of St. Louis, 783 F.2d 114 (8th Cir. 1986)	19
Yashon v. Gregory, 737 F.2d 547 (6th Cir. 1984)	18

Contents

Page

Statutes Cited:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 794 (Rehabilitation Act) 4,5,6,11

42 U.S.C. § 1981 3,5,6,9,11,12

42 U.S.C. § 1983 4,5,6,9,13

42 U.S.C. § 1985 8

42 U.S.C. § 2000d (Title VI) 3,5,6,11,12

42 U.S.C. § 12131 *et seq.* (A.D.A.) 4,5,6,11

Tennessee Code Annotated § 49-9-209 21

United States Constitution Cited:

First Amendment 1,4,10

Eleventh Amendment 5,8,9

Fourteenth Amendment 1,4,8

Rule Cited:

Federal Rule of Civil Procedure 1 25

Federal Rule of Civil Procedure 12(b) 2,9

Federal Rule of Civil Procedure12(b)(1) 2,5,6,9

Federal Rule of Civil Procedure 12(b)(6) ..... *passim*

Federal Rule of Civil Procedure 56 ..... *passim*

Page

Western District of Tennessee Local Rule 7.2 16

APPENDIX

Appendix A--Opinion of the United States Court of Appeals for the Sixth Circuit Filed August 27, 1998 . 1a

Appendix B--Opinion of the United States Court of Appeals for the Sixth Circuit Filed October 29, 1998 19a

Appendix C--Order of the United States District Court for the Western District of Tennessee, Western Division, Filed March 10, 1997 ..... 20a

Appendix D--Complaint Filed February 14, 1996 ... 46a

Appendix E--Motion to Dismiss or For Summary Judgment Filed April 15, 1996 ..... 61a

Appendix F--Defendants' Memorandum of Law Filed April 15, 1996 ..... 65a

Appendix G--Plaintiff's Memorandum of Law Filed June 19, 1996 ..... 85a

Appendix H--Defendants' Reply Memorandum of Law Filed July 30, 1996 ..... 112a

Petitioner, Samad Salehpour, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Salehpour v. University of Tennessee*, 159 F.3d 199 (6th Cir. 1998) (App. A). The opinion of the district court in *Salehpour v. University of Tennessee*, Civ.No. 97-5468 (W.D.Tenn. Mar. 10, 1997) is not published. (App. C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on August 27, 1998. The Court of Appeals denied a timely petition for rehearing on October 29, 1998. (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any per-

> son within its jurisdiction the equal protection of the laws.

Federal Rule of Civil Procedure 12(b) in relevant part states:

> Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter; . . . (6) failure to state a claim upon which relief can be granted, . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Federal Rule of Civil Procedure 56 in relevant part states:

> (c) . . . The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits.

STATEMENT OF THE CASE

Mr. Salehpour was born in the sovereign nation of Iran, has resided in the United States since 1973 and obtained his United States citizenship in 1979. Because of his ethnic origin, Mr. Salehpour has a dark complexion and speaks with an accent. Also, due to previous life-threatening situa-

tions resulting in serious injuries, Mr. Salehpour is a qualified individual with a disability as he suffers from numbness and pain in his neck, arm and back and severe headaches, nervousness and distraction if another person(s) is in close proximity to him, especially behind him, and difficulty hearing well, *i.e.* word recognition/discrimination, when background noise increases. Mr. Salehpour was admitted to the University of Tennessee College of Dentistry in Memphis, Tennessee, as a first-year dental student on August 12, 1994.

A. Complaint.

Mr. Salehpour filed his complaint[1] in the case *sub judice* on February 14, 1994, alleging the following claims:

Count I of the complaint (App. D, pp. 51a-52a) alleges claims for ethnic discrimination and retaliation brought pursuant to 42 U.S.C. § 1981 and 42 U.S.C. § 2000d (Title VI). Mr. Salehpour claimed that the University of Tennessee's policies, procedures, rules and regulations, including, but not limited to, discipline, dress code, responses to inquiries and grading, were applied differently to him by the individually-named Defendants because of his national origin. The University of Tennessee sanctioned the application of these policies, procedures, rules and regulations. Further, Mr. Salehpour filed a complaint for ethnic discrimination and retaliation with Defendant Puckett of the Affirmative Action Office. Ms. Puckett failed to conduct a proper investigation and subsequently determined that Mr. Salehpour's complaint was without merit. Mr. Salehpour was retaliated against for opposing the discriminatory application of these policies, procedures, rules and regulations and for filing his complaint with the Affirmative Action Office.

---

[1]To assist the Court a copy of Mr. Salehpour's complaint is attached as Appendix D.

Count II of the complaint (App. D, pp. 52a-56a) is brought pursuant to 42 U.S.C. § 1983, incorporates Count I of the Complaint and alleges claims for constitutional violations, *i.e.* Fourteenth Amendment (due process[2] and equal protection of the laws) and First Amendment (privacy and free speech) rights, as well as conspiracy by the individually-named Defendants to deny Mr. Salehpour his constitutionally-protected rights.

Count III of the complaint (App. D, pp. 56a-58a) alleges claims for disability discrimination brought pursuant to 42 U.S.C. § 12131 *et seq.* (Americans With Disabilities Act (A.D.A.)) and 29 U.S.C. § 794 (Rehabilitation Act (Rehab Act)). The claims brought in Count III address rules which are discriminatory as applied to qualified disabled individuals because they have a negative impact only on disabled students. These rules include 1) barring students from sitting in the back row of classrooms, 2) barring students from obtaining copies of material used in slide and view graph presentations, 3) dress codes, 4) holding students over in class during scheduled breaks, and 4) disallowing students from tape recording class lectures. These rules had a impact on Mr. Salehpour as the imposition of the rules had the negative effect of limiting his participation in the educational programs at the University of Tennessee's College of Dentistry. Further, Mr. Salehpour was retaliated against through harassment and discipline after he opposed these discriminatory rules.

Counts IV and V of the complaint (App. D, pp. 58a-59a) allege state claims only against the individually-named

---

[2]Mr. Salehpour was not given notice of the specific charges lodged against him. Further, Mr. Salehpour had a statutory (state) right to notice of the specific charges, a hearing where he could be represented by an attorney and cross-examine witnesses. Mr. Salehpour was denied this right and his discipline was adjudicated by a committee charged only with academic matters. (App. D, pp. 53a-56a).

Defendants for intentional and/or negligent infliction of emotional distress.

B. Motion to Dismiss or For Summary Judgment.[3]

On April 15, 1994, Defendants filed their Motion to Dismiss or for Summary Judgment[4] and memorandum of law addressing the following claims in Mr. Salehpour's complaint:

Pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure (F.R.C.P.) (subject matter jurisdiction), the University of Tennessee and the official capacity Defendants moved to dismiss Mr. Salehpour's claims brought pursuant to 42 U.S.C. § 1981, § 1983 and under state law. (App. E). The memorandum of law filed with the motion addressed only the issue of Eleventh Amendment immunity for the 42 U.S.C. § 1981 and state law claims and addressed only the claims of compensatory and punitive damages for the 42 U.S.C. § 1981 claims. (App. F, pp. 68a-69a).

Pursuant to Rule 12(b)(6), F.R.C.P., (failure to state a claim), all Defendants moved for dismissal of Mr. Salehpour's claims brought pursuant to Title VI, § 1981, Title II of the A.D.A. and § 504 of the Rehab Act. (App. E). Defendants' memoranda of law addressed only the alleged lack of specificity of "facts from which this court could draw a reasonable inference that plaintiff was discriminated against

---

[3]To assist the Court, a copy of the Motion to Dismiss or For Summary Judgment is attached as Appendix E, a copy of the Defendants' memorandum of law is attached as Appendix F, a copy of Mr. Salehpour's responsive memorandum of law is attached as Appendix G, and a copy of the Defendants' reply memorandum of law is attached as Appendix H. The exhibits attached to the memoranda are not included.

[4]Defendants' motion combined dismissal motions and summary judgment motions, *i.e.* only two Defendants, Rice and Johnson, specifically moved, in the alternative, for summary judgment. (App. E).

on the basis of his national origin" for the Title VI and § 1981 claims, and, by footnote, claimed retaliation is not available under these statutes.[5] (App. F, pp. 69a-71a; *see generally* App. H). As to Mr. Salehpour's claims brought pursuant to the A.D.A. and the Rehab Act, Defendants' memoranda addressed only the lack of specificity of "factual allegations sufficient to allow even an inference that plaintiff is an 'individual with a disability'" and that the complaint failed to "allege facts from which the court could conclude that adverse action was taken against plaintiff 'solely by reason of . . . his disability.'"[6] (App. F, pp. 72a-76a; App. H, pp. 122a-124a). Further, and more in the guise of a Rule 12(b)(1) (jurisdiction) motion, the individual-capacity Defendants argued they could not be held liable under these statutes; an argument Mr. Salehpour did not oppose. (App. F, pp. 76a-77a; App. G, p. 98a).

Pursuant to Rule 12(b)(6), F.R.C.P., (failure to state a claim), the individual-capacity Defendants moved for dismissal of Mr. Salehpour's claims brought pursuant to Title VI, the A.D.A., the Rehab Act, and 42 U.S.C. § 1983 (App. E, pp. 61a-64a) on the following grounds:

1) Defendants Johnson and Rice were not personally involved in violating Mr. Salehpour's constitutional rights. (App. E, p. 63a). Their arguments were based on their lack of personal involvement in the violation of Mr. Salehpour's federal rights and the inapplicability of *respondeat superior* liability (no opposition was raised to the *respondeat superior*

---

[5]It appears Defendant Rice converted his claim of dismissal to one for summary judgment by reference to his Affidavit. (App. F, p. 71a). Because Defendant Rice only attached to his Affidavit a May 15, 1995, letter from Mr. Salephour, Mr. Salehpour filed with the Court the enclosures (consisting of 83 pages and a tape recording) to this letter. (App. G, pp. 93a-95a).

[6]Mr. Salehpour did not allege this claim in his complaint. (App. D).

argument). (App. F, pp. 77a-80a; App. G, p. 98a; App. H, 119a-121a).[7]

2) Mr. Salehpour was not deprived of a constitutionally-protected property or liberty interest, and 3) Mr. Salehpour received adequate due process. (App. E, p. 63a; App. F, pp. 80a-81a; App. H, pp. 125a-126a). Because Mr. Salehpour referenced the 1994-95 "Center Scope" Student Handbook to oppose Defendants' arguments, these issues raised by Defendants' motion were properly converted to a Rule 56, F. R.C.P. (summary judgment) motion. (App. G, pp. 99a-102a).

4) Mr. Salehpour was not retaliated against for exercising his right to free speech. (App. E, p. 63a). In their memoranda of law, Defendants only argued a failure to plead sufficient facts to support this claim. (App. F, p. 82a; App. H, pp. 126a-127a; *see also* App. G, 102a).

5) Qualified immunity because the right to due process or free speech was not clearly established. (App. E, p. 63a). Defendants' argument raised in their memoranda of law merely asserts that "[n]o reasonable person would have known that plaintiff was entitled to any more procedural process than he received"[8] and "[no] reasonable person [would] have known that enforcing a classroom rule would constitute a violation of plaintiff's free speech rights."[9] (App. F, p. 82a; App. H, pp. 127a-129a; *see also* App. G, pp.

---

[7]Mr. Salehpour filed with the Court the 1994-95 "Center Scope" Student Handbook and attached to his memorandum of law and referred to therein the relevant portions of the Handbook (42 pages) to oppose the lack of personal involvement issue raised in Defendants Johnson's and Rice's summary judgment argument. (App. G, pp. 90a n.3, 98a-99a).

[8]*Supra* n. 2.

[9]Mr. Salehpour did not allege this claim in his complaint. (App. D).

102a-103a).

6) Mr. Salehpour's conspiracy claim is barred by the intra-corporate conspiracy doctrine. (App. E, p. 63a). Defendants' memoranda of law merely restates this position set out in their motion (App. F, pp. 82a-83a; App. H, pp. 130a-131a); however, as pointed out by Mr. Salehpour in his response, the court must first determine whether the individuals were acting in the scope of their employment. (App. G, pp. 103a-104a).

The individual-capacity Defendants also moved for dismissal of the state law claims based on absolute immunity. (App. E, p. 63a). Since the district court dismissed these claims without prejudice after granting summary judgment on all of Mr. Salehpour's federal claims (App. C, p. 43a), discussion of these claims is unnecessary for purposes of this Petition.

Noticeably absent from Defendants' motion, whether for dismissal or for summary judgment, and memorandum of law are Mr. Salehpour's claims for 1) the discriminatory rules and their negative impact on disabled individuals, including Mr. Salehpour, comprising the claims in Count III, 2) violation of his right to privacy, 3) qualified immunity for any claims other than due process and free speech, *i.e.* equal protection, right to privacy, conspiracy,[10] 4) § 1981 claims against the defendants who did not raise the Eleventh Amendment immunity issue, and 4) Fourteenth Amendment violation of equal protection of the laws.

C. District Court Ruling.

Although documents outside the pleadings were only

---

[10]The district court did note that Mr. Salehpour did not have a conspiracy claim under § 1985. (App. C, p. 40a n.6). Mr. Salehpour did not allege a claim of conspiracy under § 1985. (App. D).

referred to on specific claims and the majority of the motion and memoranda only addressed the threshold issue of dismissal without reference to documents outside the pleadings or legal arguments supporting summary judgment, the district court, without prior notice to the parties, converted the entire motion, including the Rule 12(b)(1) motions to Rule 12(b)(6) motions, to one for summary judgment stating,

> As both parties have relied on matters outside the pleadings, the court will treat Defendants' motion as one for summary judgment in accordance with Rule 12(b).

The district court then proceeded to dismiss, including *sua sponte* dismissal of claims not raised by Defendants' motion, Mr. Salehour's entire action.

The district court made summary factual determinations based on the limited documentary material filed with the court. Included in these factual findings, the court determined that the "entire lawsuit revolves around a power struggle," and that the "power struggle" centered around the back-row seating rule. (App. C, pp. 20a-23a). The court specifically granted summary judgment on the following claims:[11]

Eleventh Amendment Immunity. The court did not mention Title VI, but did hold that Mr. Salehpour was entitled to prospective relief under § 1981 and § 1983. (App. C, pp. 24a-26a).

Procedural Due Process. The court held that Mr. Salehpour received adequate due process since he "received

---

[11]The court, without discussion, granted summary judgment on the remainder of Mr. Salehpour's claims.

both notice of the Academic Status Committee's meeting,[12] and an opportunity to present his side of the story."[13] (App. C, pp. 26a-28a).

Equal Protection. Although defendants did not raise the equal protection claim in their motion or memorandum of law, the court elaborated on this issue before *sua sponte* granting summary judgment. (App. C, pp. 28a-32a).

Qualified Immunity. Qualified immunity was granted only on Mr. Salehpour's First Amendment free speech claim (App. C, pp. 32a-39a) with the court stating:

> [W]hether the First Amendment protects Mr. Salehpour's in-class exchanges with his professors and his subsequent actions is a question to debatable to have given the university officials involved reasonable standards around which to structure their behavior.

---

[12]Mr. Salehpour can only assume the court means the date and time of the meeting.

[13]Even though, at this juncture, the court held Mr. Salehpour received adequate notice, the court later opines:

> [T]he minutes of the March 1 disciplinary hearing reveal that Dean Lynch's motivation in pursuing academic discipline against Plaintiff was based on what Plaintiff had *written* in his letter to Professor Bowles, not merely Plaintiff's stubborn refusal to change seats and his open challenge of the policy during class time.
>
> Given the vague criteria of UT's ethical/behavior code, it is difficult to imagine how a student could "possibly know what would be a disruption in the opinion of his school" because the word "misconduct" acquires "only such meaning as [the university] may attach to it at any given time."

(App. C, pp. 37a-38a).

(App. C, p. 33a).

§ 1981. In support of its summary judgment ruling, the court noted that Mr. Salehpour did not claim a "contractual relationship" with the University of Tennessee[14] and that his "purely conclusory allegations, presented in self generated documents" did not create a genuine issue of material fact. (App. C, p. 39a).

Title VI. Focusing solely on the disciplinary charges brought against Mr. Salehpour, the court held Mr. Salehpour failed to provide evidence that the charges were "motivated by the fact that he is Iranian and that his national origin 'was a determining factor.'" (App. C, pp. 39a-40a).

A.D.A. and Rehab Act. The court's decision to grant summary judgment was based solely on Mr. Salehpour's lack of evidence that "the disciplinary action taken against him was 'solely by reason' of his condition."[15] (App. C, pp. 40a-42a).

D. Sixth Circuit Ruling.

Following the district court, the Sixth Circuit decided Mr. Salehpour's entire case revolved around the back-row seating rule. (App. A, pp. 3a-7a). Addressing the issues Mr. Salehpour raised on appeal, the Sixth Circuit held as follows:

Notice of Summary Judgment. The Sixth Circuit affirmed the district court's *sua sponte* conversion of the Rule 12(b)(6) motion addressing certain claims as well as claims

---

[14]Mr. Salehpour did, in fact, allege in his complaint a contractual relationship with the University of Tennessee. (App. D, p. 52a).

[15]Mr. Salehpour did not allege this claim; rather, he alleged the discipline was retaliation for opposing the discriminatory rules which had a negative impact on disabled individuals. (App. D, pp. 56a-58a).

not raised in the motion. (App. A, pp. 8a-11a). This decision was based on two factors: 1) Mr. Salehpour filed over two hundred pages of documentary materials,[16] (*Id.*), and 2) the court did not rule on the motion for approximately eleven months.[17] (*Id.*).

Summary Judgment to Defendants Rice and Johnson. The Sixth Circuit held 1) that where alleged nondisputed material facts can be gleaned from affidavits filed, there is no need to comply with a Local Rule which requires these facts to be set out in the movant's memorandum (App. A, pp. 11a-12a); that because Mr. Salehpour failed to state what

---

[16]Mr. Salehpour filed with the court eighty-three (83) pages of enclosures to the May 15th letter on the issues of Defendant Rice's position on the Title VI and § 1981 claims against him and on Defendants Rice's and Johnson's personal involvement in the constitutional violations. Mr. Salehpour also filed with the court the 1994-95 "Center Scope" Student Handbook which covers all of the departments/schools at the University of Tennessee, but only attached forty-two (42) pages from the Handbook supporting his arguments on procedural due process and Defendants Rice's and Johnson's personal involvement in the constitutional violations.

[17]Shortly before Mr. Salehpour filed his complaint, the Honorable Bernice Donald was appointed to the federal bench. Mr. Salehpour's case was assigned to Judge Donald who requested that attorneys with cases in her court bear with her while she got her bearings. Numerous cases from other courts were transferred to Judge Donald which required her to review and familiarize herself with ongoing cases. For this reason, the scheduling conference in the case at bar was not held until mid-October, 1996, at which time Judge Donald again requested counsels' patience. During the scheduling conference, Judge Donald did not mention she was considering summary judgment on all claims.

Further, since Defendants' motion and memoranda indicated they were addressing the threshhold issue of dismissal and there were claims not mentioned in Defendants' motion and, therefore, not before the court, Mr. Salehpour had no reason to believe additional material or arguments were necessary at that time.

issues of fact were created by the materials filed or why the factual issues would be "sufficient to go forward with these claims," he waived the issue for appellate review (App. A, pp. 12a-13a); and 3) that the substance of Mr. Salehpour's § 1983 claims against Defendants Rice and Johnson were couched in *respondeat superior* liability and that Mr. Salehpour relied on *respondeat superior* case law to support his claim.[18] (App. A, pp. 13a-15a).

Procedural Due Process. Disregarding the district court's ruling on this issue,[19] the Sixth Circuit determined that since Mr. Salehpour presented an argument on the back-row seating rule during the disciplinary proceedings, he knew what charges were being brought against him. (App. A, p. 16a).

Qualified Immunity. Addressing only Mr. Salehpour's free speech claim, the court held Mr. Salehpour failed to articulate a right to free speech since "the expression appears to have no intellectual content or even discernible purpose." (App. A, p. 18a).

---

[18]The cases Mr. Salehpour relied on were *Copeland v. Machulis*, 57 F.3d 476, 481 (6th Cir. 1995); *Leach v. Shelby County Sheriff*, 891 F.2d 1241 (6th Cir. 1989), *quoting Rizzo v. Goode*, 423 U.S. 362, 371, 96 S.Ct. 598, 604, 46 L.Ed.2d 561 (1976), and *quoting Hays v. Jefferson*, 668 F.2d 869, 874 (6th Cir.), *cert. denied*, 459 U.S. 833, 103 S.Ct. 75, 74 L.Ed.2d 73 (1982).

[19]*Supra* pp. 9-10 and n. 13.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE CIRCUITS ARE IN CONFLICT WITH WHAT NOTICE IS REQUIRED WHEN A DISTRICT COURT *SUA SPONTE* GRANTS SUMMARY JUDGMENT.

Mr. Salehpour's petition for writ of certiorari should be granted because the circuits are in conflict with what notice is required when a district court *sua sponte* grants summary judgment.

This Court has held that district courts have authority to *sua sponte* enter summary judgment if the losing party is put on notice that he must come forward with all of his evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325-26, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).[20] Numerous questions on the issue of "notice" have arisen which require this Court's attention: 1) What notice is required before a court converts a Rule 12(b)(6) motion to a Rule 56 motion?[21] 2) What notice is required when a court *sua sponte* grants summary judgment in the absence of a motion, but documents outside the pleadings have been filed with the court? 3) What constitutes "harmless error" when a court grants summary judgment after conversion or absent a motion? 4) What standard of review should the appellate courts apply to a summary judgment ruling when notice is not provided

---

[20]This Court has held that the "[d]eviation from a legal rule is 'error' unless the rule has been waived." *United States v. Olano*, 507 U.S. 730, 732-33, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993).

[21]This question is particularly critical where the only arguments presented by the movant and responded to by the nonmovant involve threshold dismissal arguments.

prior to a district court granting summary judgment after conversion or absent a motion? The circuits are not in agreement in responding to these questions.

The First Circuit requires two conditions precedent be satisfied before a court can *sua sponte* grant summary judgment: 1) the discovery phase must be sufficiently advanced so that the parties know what material evidence can be adduced and the court can make an accurate determination, and 2) the nonmovant or "target" must be on notice of the necessity to produce all evidence pertaining to the particular claim or defense at issue,[22] *Penebscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 562 (1st Cir. 1997); *Stella v. Town of Tewksbury*, 4 F.3d 53, 55 (1st Cir. 1993), unless the nonmovant has received material outside the pleadings from the movant, has had an opportunity to respond to those materials, but does not controvert the accuracy of the materials. *Chaparro-Febus v. Local 1575*, 983 F.2d 325, 332 (1st Cir. 1992).

The Second Circuit panels are not in disagreement on what notice is required. In *Kopec v. Coughlin*, 922 F.2d 152 (2nd Cir. 1991), the court held that when a district court is confronted with materials outside the pleadings on a Rule 12(b)(6) motion, it must either disregard the materials or provide notice to the parties of the contemplated conversion. *Id.* at 155-56.[23] But in *Kennedy v. Empire Blue Cross and Blue*

---

[22]It is noteworthy that the First Circuit requires a court to provide notice and an opportunity to present arguments and/or documents, *Cooperative de Ahorro y Credito Aguada v. Kidder*, 993 F.2d 269, 273 (1st Cir. 1993), but the requirement for notice and opportunity to be heard is not required in the Ninth Circuit, *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994), where a court decides to take judicial notice of a fact.

[23]Other Second Circuit panels have held that the notice requirement need not be adhered to only in extraordinary cases where the "ten day notice is impractical, and it is absolutely clear that the non-moving

Shield, 989 F.2d 588 (2nd Cir. 1993), the court held that if it was possible for the nonmovant to have reasonably known that the motion might be converted and would not be surprised by the conversion, summary judgment would be appropriate. *Id.* at 592. Further, if a district court has a Local Rule which requires the movant to set forth a "statement of alleged undisputed material facts," it is error for the court to grant summary judgment on an issue not raised in the statement.[24] *FLLI Moretti Cereali v. Continental Grain*

---

party suffered no prejudice from a shortening of the period." *Scottish Air Int'l. v. British Caledonian Group*, 945 F.2d 53, 55 (2nd Cir. 1991); *Gutwein v. Roche Laboratories*, 739 F.2d 93, 95 (2nd Cir. 1984).

[24]The Western District of Tennessee has a similar Local Rule set forth, in relevant part, as follows:.

> (2) Motion. On every motion for summary judgment, in addition to citations to appropriate legal authorities, the proponent of the motion shall designate in the accompanying memorandum by serial numbering each material fact upon which the proponent relies in support of the motion and shall affix to the memorandum copies of the precise portions of the record relied upon as evidence of each material fact. If the proponent contends that the opponent of the motion cannot produce evidence to create a genuine issue of material fact, the proponent shall affix to the memorandum copies of the precise portions of the record relied upon as evidence of this assertion.
>
> (3) Response. In addition to citing appropriate legal authorities, the opponent of a motion for summary judgment who disputes any of the material facts upon which the proponent has relied pursuant to subsection (2) above shall respond to the proponent's numbered designations, using the corresponding serial numbering, both in the response and by affixing to the response copies of the precise portions of the record relied upon to evidence the opponent's contention that the proponent's designated material facts are at issue.

However, this rule was disregarded by both the district court and the

Co., 563 F.2d 563, 565 (2nd Cir. 1977).

The Third Circuit requires notice and an opportunity to respond prior to conversion of a motion to dismiss to a motion for summary judgment, *Hilfirty v. Shipman*, 91 F.3d 573, 578 (3rd Cir. 1996), unless "it appears that there is no set of facts on which [the nonmovant] could possibly recover." *Rose v. Bartle*, 871 F.2d 331, 342 (3rd Cir. 1989).

The Fourth Circuit requires that when documents outside the pleadings are produced, all parties must be given notice that the Rule 12(b)(6) motion may be converted to summary judgment and a reasonable opportunity to conduct discovery so that pertinent materials may be submitted to the court. *Gay v. Wall*, 761 F.2d 175, 177 (4th Cir. 1985). *See also In Re Professional Coatings (N.A.), Inc.*, 210 B.R. 66, 70 n. 1 (Bkrtcy.E.D.Va. 1997).

The Fifth Circuit strictly adheres to the ten-day notice rule of Rule 56 prior to a district court's conversion of a motion to dismiss to a motion for summary judgment, *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 504 (5th Cir. 1994); *Estate of Smith v. Tarrant County Hosp. Dist.*, 691 F.2d 207, 208 (5th Cir. 1982); *Matter of Hailey*, 621 F.2d 169, 171-72 (5th Cir. 1980), unless "the nonmovant has no additional evidence."[25] *Nowlin* at 504; *Resolution Trust Corp. v. Sharif-Munir-Davidson Dev. Corp.*, 992 F.2d 1398, 1403 n. 7 (5th Cir. 1993); *Powell v. U.S.*, 849 F.2d 1576, 1582 (5th Cir. 1988).

Sixth Circuit. (App. A, pp. 11a-12a; App. C).

[25]The Fifth Circuit allows the party who is the target of a *sua sponte* summary judgment to submit the materials to the appellate court that would have been submitted to the district court for review to determine whether harmless error has occurred. *Sharif-Munir-Davidson* at 1403 n.7; *Powell* at 1582. However, it is not clear what procedure is followed if additional discovery is required to garner the required materials.

The Sixth Circuit adheres strictly to the notice requirement if no motion at all has been filed, provided the party who is wronged can show prejudice on appeal.[26] *Yashon v. Gregory*, 737 F.2d 547, 552 (6th Cir. 1984); *Kistner v. Califano*, 579 F.2d 1004, 1006 (6th Cir. 1978). The facts and circumstances of each case are reviewed to determine whether notice should have been given. *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 393 (6th Cir. 1975). "Where one party is likely to be surprised by the proceedings, notice is required." *Id.* The Sixth Circuit reviews a *sua sponte* grant of summary judgment for an abuse of discretion applying the summary judgment standard of review.

In the Seventh Circuit, either the district court or the appellate court can grant summary judgment *sua sponte* without a motion, but notice must be given to the parties. *Eliasen v. Intel Corp.*, 82 F.3d 731, 738 (7th Cir. 1996); *Resolution Trust Corp. v. Ruggiero*, 994 F.2d 1221, 1226 (7th Cir. 1993). When a motion to dismiss has been converted to a motion for summary judgment, the Seventh Circuit only adheres to the notice requirement if the "record discloses the existence of unresolved material fact issues," or the parties represent that material factual issues would have been submitted had the opportunity been given. *Bohac v. West*, 85 F.3d 306, 312 (7th Cir. 1996); *Burrick v. Edward Rose & Sons*, 18 F.3d 514, 516 (7th Cir. 1994). However, it is harmless error if nothing else could have been submitted to alter the ruling. *Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680, 685 (7th Cir. 1994).

In the Eighth Circuit, when documents outside the pleadings are submitted on a motion to dismiss and the court does not exclude those documents prior to granting summary judgment, the party against whom summary judgment

---

[26]However, as in the case at bar, it appears if a motion is filed, but not all issues are raised in the motion, the strict adherence rule of the Sixth Circuit is not applicable whether prejudice is shown or not.

is granted is held to be on "constructive notice" of the court's conversion intention, *Angel v. Williams*, 12 F.3d 786, 789 (8th Cir. 1993), unless "the record is insufficient to support summary judgment." *Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir. 1992). However, summary judgment cannot be granted *sua sponte* on issues not raised in the motion to dismiss without notice and an opportunity to be heard on those issues. *Layton v. U.S.*, 919 F.2d 1333, 1334-35 (8th Cir. 1990); *Williams v. City of St. Louis*, 783 F.2d 114, 117 (8th Cir. 1986).

The Ninth Circuit requires notice prior to the court *sua sponte* granting summary judgment, but recognizes that notice is satisfied if the nonmoving party is "fairly apprised" that the court is considering summary judgment. *In Re Rothery*, 143 F.3d 546, 549 (9th Cir. 1998); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1408 (9th Cir. 1995). "A party is 'fairly apprised' . . . if that party submits matters outside the pleadings to the judge and invites consideration of them." [27] *Rothery* at 549.

The Tenth Circuit strictly adheres to the ten-day notice requirement, and will only uphold dismissal if it "can be justified under Rule 12(b)(6) standards without reference to matters outside the plaintiff's complaint." *David v. City and County of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996); *Blue Circle Cement v. Board of County Com'rs.*, 27 F.3d 1499, 1503 (10th Cir. 1994); *Miller v. Glanz*, 948 F.2d 1562, 1566 (10th Cir. 1991).

The Eleventh Circuit strictly adheres to the ten-day notice requirement of Rule 56 recognizing that the notice requirement is "a vital procedural safeguard." *Massey v. Congress Life Ins. Co.*, 116 F.3d 1414, 1417 (11th Cir. 1997). *See*

---

[27] It is not clear from the case law whether the Ninth Circuit adheres to this definition on issues not properly supported by argument or on issues not raised in a motion to dismiss.

also Jones v. Automobile Ins. Co. of Hartford, Conn., 917 F.2d 1528, 1533 (11th Cir. 1990)(The only exception is where the record clearly shows the nonmovant was aware of the conversion of a Rule 12(b)(6) motion to a Rule 56 motion.).

The Federal Circuit holds that where memoranda filed for and against a motion to dismiss contain only arguments on the threshold matter of dismissal, the court cannot *sua sponte* convert that motion to one for summary judgment without giving the requisite notice. *Selva & Sons, Inc. v. Nina Footwear, Inc.*, 705 F.2d 1316, 1323 (Fed.Cir. 1983).

The Circuits' responses to the questions on notice[28] range on a continuum where the notice requirement is strictly enforced (as in the Fourth, Tenth, Eleventh and Federal Circuits) to a virtually nonexistent requirement for notice (as in the Sixth Circuit) whether or not a motion is filed. "Harmless error" is considered differently by virtually every circuit. The standard of review varies from use of the Rule 12(b)(6) standard of review without review of documentary materials outside the pleadings to Rule 56 standard of review.

Mr. Salehpour did not receive the requisite notice of the conversion of the Rule 12(b)(6) motion to a Rule 56 motion on certain claims where only threshold matters of dismissal were argued nor did he receive the requisite notice that the court was considering summary judgment on claims not raised by defendants in their motion. Thus, plenary consideration of the matter by this court is essential.

---

[28] *Supra* at pp. 15-20.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE REQUISITE ELEMENTS OF DUE PROCESS.

Mr. Salehpour's petition for writ of certiorari should be granted because the opinion below conflicts with this Court's prior rulings on the requisite elements of due process.

The University of Tennessee provides a statutory[29] and

---

[29]In establishing the University of Tennessee, the state legislature enacted the following mandate to the University Board of Trustees:

> **49-9-209. Power of the trustees.**
>
> . . .
>
> (e)(1) The trustees at their stated sessions shall also have full power and authority to make such bylaws, rules and regulations for the government of the university and the promotion of education therein as in their opinion may be expedient or necessary.
>
> (2) Such bylaws, rules and regulations shall not be inconsistent with the constitution and laws of the United States, or of this state.

Thus, pursuant to this mandate, any rules and regulations created by the Board of Trustees are legislative in form and are to be given the same force and effect as a law created by statute. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03, 99 S.Ct. 1705, 1718, 60 L.Ed.2d 208 (1979), *quoting Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977). Among the rules and regulations made effective by the Board of Trustees are those contained in the University of Tennessee "Center Scope" Student Handbook.

> All rules, regulations and statements contained in this publication have originated with, and been developed through student/faculty/ administration discussion and approval processes. Changes, deletions and additions to any positions or regulations are developed, approved and forwarded from the Student

contractual[30] right to due process when discipline is contemplated. This is in addition to Mr. Salehpour's constitutional right to due process. However, rather than affording Mr. Salehpour appropriate due process, Mr. Salehpour was denied the requisite notice of the charges being brought against him, was not allowed to hear the case brought against him, had to prepare a defense by guessing what the charges might be, and was denied legal counsel. Discipline was imposed against Mr. Salehpour by a committee at the University of Tennessee charged only with addressing academic concerns. (App. D, pp. 53a-55a).

This Court has held that in order to satisfy the "funda-

> Government Association through the UT Memphis campus administration and **finally approved by the University Board of Trustees**. (emphasis added)

Further, in the Handbook, under the section "Student Conduct and Judicial Systems," the following statements appear:

> In accordance with provisions set forth by the University of Tennessee Board of Trustees, a student who is alleged, charged and/or penalized for an action of misconduct or for a rule violation may make an appeal of the allegation or penalty. The opportunities for such an appeal and the procedures established for the hearing are described in the following sections.
>
> . . .
>
> The University of Tennessee Board of Trustees at its June 1976 meeting, took action which requires students to choose either to have a hearing according to University procedures or according to the "contested cases" section of the Uniform Administrative Procedure Act and to execute a waiver of rights to a hearing under the other.

[30]"The relationship between a university and a student is contractual in nature." *Corso v. Creighton University*, 731 F.2d 529, 531 (8th Cir. 1984).

mental requisite of due process of law," the person being charged must receive

> "timely and adequate notice detailing the reasons for [the charges], and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."

Goldberg v. Kelly, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970); *see also Dixon v. Alabama State Board of Education*, 294 F.2d 150, 158 (5th Cir.), *cert. denied*, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961). At the very least, a student must be notified of the charges being lodged against "him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Goss v. Lopez*, 419 U.S. 565, 581, 95 S.Ct. 729, 740, 42 L.Ed.2d 725 (1975). Further, this Court has held that there is a "significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct." *Board of Curatores v. Horowitz*, 435 U.S. 78, 86, 98 S.Ct. 948, 953, 55 L.Ed.2d 124 (1978). Matters involving discipline require heightened procedural protection than matters involving academic decisions.[31] *Id.* at 86-89.

The Student Handbook provides two sets of procedural rules, i.e. those that are available when discipline is to be imposed for violation of conduct rules (App. D, p. 53a) and those that are available when academic standards are in question. The University of Tennessee provides the requisite heightened due process for disciplinary hearings as re-

---

[31]Interestingly, the Academic Status Committee meeting was scheduled right before an exam schedule. (App. D, p. 53a). Although Mr. Salehpour requested the meeting be postponed until after exams, his request was ignored. (*Id.*). As a result, Mr. Salehpour failed or nearly failed all of his exams.

quired by law; however, Mr. Salehpour was denied the heightened due process afforded to other students at the University of Tennessee.

Although the district court recognized that the discipline charges brought against Mr. Salehpour were the result of the contents of a letter Mr. Salehpour had written, (App. C, p. 37a), it found that Mr. Salehpour received adequate due process because he received "notice" of the meeting.[32] (App. C. 27a). The Sixth Circuit, ignoring the findings of the district court, particularly that the reason the charges were brought was the contents of the letter, found that since Mr. Salehpour presented an argument about the back-row seating rule, this somehow converted the reason for the charges to Mr. Salehpour's violation of the back-row seating rule, and, thus, Mr. Salehpour must have known what the charges were that were brought against him. (App. A, p. 16a). The rulings of the lower courts in the case at bar conflict with this Court's prior rulings on what constitutes constitutional due process.

Mr. Salehpour's petition should be granted so that the Court may affirm the importance of its longstanding holdings on due process.

---

[32] *See supra* pp. 9-10 and n. 13.

CONCLUSION

This case presents two questions of exceptional importance:

1) whether a court must provide adequate notice that it is contemplating the granting of summary judgment against a party with or without a motion before the court. If the opinion below is allowed to stand, Mr. Salehpour will be denied the opportunity to present arguments opposing summary judgment on his claims, and, thereby, denied his day in court, *i.e.* "a **just**, speedy and inexpensive"[33] (emphasis added) determination of his claims.

2) whether a student at a state funded and operated university of higher education must be afforded the requisite due process as set forth by this Court in its prior rulings interpreting the United States Constitution prior to discipline being imposed. If the opinions below are allowed to stand, state universities will be allowed to arbitrarily deprive students of their constitution right to due process prior to discipline being imposed.

According, Mr. Salehpour respectfully requests that his petition for writ of certiorari be granted.

Respectfully Submitted,

CONNIE WESTBROOK
Counsel of Record
147 Jefferson Avenue
Suite #200
Memphis, Tennessee 38103
(901) 527-8339

Attorney for Petitioner

---

[33]Federal Rule of Civil Procedure 1.

APPENDIX A -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 27, 1998

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMAD SALEHPOUR,
Plaintiff-Appellant,

v. No. 97-5468

UNIVERSITY OF TENNESSEE, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 96-02217--Bernice B. Donald, District Judge.

Argued: April 30, 1998

Decided and Filed: August 27, 1998*

Before: NELSON, BOGGS, and CLAY, Circuit Judges.

---

*This decision was originally issued as an "unpublished decision" filed on August 27, 1998.

COUNSEL

ARGUED: Connie K. Westbrook, Memphis, Tennessee, for Appellant. Odell Horton, Jr., UNIVERSITY OF TENNESSEE, OFFICE OF GENERAL COUNSEL AND SECRETARY, Memphis, Tennessee, for Appellees.
ON BRIEF: Connie K. Westbrook, Memphis, Tennessee for Appellant. Odell Horton, Jr., UNIVERSITY OF TENNESSEE OFFICE OF GENERAL COUNSEL AND SECRETARY, Memphis, Tennessee, Catherine S. Mizell, THE UNIVERSITY OF TENNESSEE, Knoxville, Tennessee, for Appellees.

OPINION

CLAY, Circuit Judge. Plaintiff, Samad Salehpour, appeals from the order entered by the United States District Court for the Western District of Tennessee granting Defendant, the University of Tennessee's, *et al.*[1], motion for summary judgment in this case arising under 42 U.S.C. § 1981 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.*; 42 U.S.C. § 1983; and ancillary state law claims of intentional and negligent infliction of emotional distress. For the reasons stated herein, the district court's order is AFFIRMED.

STATEMENT OF FACTS

Plaintiff (who was forty-three years old at the time he filed this appeal) is a native of Iran and has been a citizen of the United States since 1979. Because of his Iranian ethnic-

[1]Plaintiff filed suit against the University of Tennessee (the "University") and twenty University administrators and faculty members.

ity, Plaintiff is dark complected and speaks with an accent. Plaintiff was admitted to the College of Dentistry ("College") at the University of Tennessee ("University") as a first-year dental student on August 12, 1994, after a twelve-year career as a mechanical engineer in the aerospace industry.

Dr. William F. Bowles (Chair of the Department of Prosthodontics, Professor in the Department of Prosthodontics, and a Member of the Academic Status Committee (the "Committee") at the University), as well as Dr. Victor A. Fletcher (Associate Professor in the Department of Prosthodontics at the University), have a policy of barring first-year dental students from sitting in the last row of their classrooms. Dr. Bowles informed Plaintiff and his classmates on the first day of class of this policy. On January 31, 1995, Dr. Bowles and Dr. Lynch (Associate Dean of the College and a Professor in the Department of Orthodontics at the University) met with Plaintiff, at his request, regarding the "last row rule" and other matters of concern, such as Dr. Bowles classroom dress code. At the meeting, Dr. Lynch informed Plaintiff that Dr. Bowles had every right to tell his students where he wished them to sit in his classroom, and that by accepting admission into the College, Plaintiff agreed to abide by all of the rules, not just the ones that suited his temperament.

Less than one week later, Plaintiff wrote a letter to Dr. Bowles reiterating the same concerns addressed at the meeting, including Plaintiff's displeasure with the "last row rule." The next day, February 7, 1995, Plaintiff sat in the last row of Dr. Bowles' class. Dr. Bowles allowed Plaintiff to remain seated in the last row, so as not to disturb the class. However, in a letter dated February 9, 1995, addressed to Plaintiff, Dr. Bowles expressed his displeasure with Plaintiff's decision to sit in the last row (despite the numerous requests not to do so), and warned Plaintiff that he would be instructed to leave the classroom if he violated the "last row rule" again.

On February 13, 1995, Plaintiff sat in the last row of Dr. Fletcher's class (the other professor who had a policy

against such conduct), in the presence of a guest lecturer, Dr. John Dean. Dr. Fletcher requested that Plaintiff move from the last row to another seat; however, Plaintiff replied that he was comfortable where he was sitting and did not wish to move. Dr. Fletcher informed Plaintiff that if he did not move to another seat, he would have to leave the class. Dr. Dean intervened and urged Plaintiff to move because of the importance of the lecture. Plaintiff chose to leave the class, an action to which Dr. Dean allegedly took great offense. In response to this incident, Dr. Fletcher wrote a letter to Dr. Lynch, describing Plaintiff's disruptive conduct as being in violation of the professional ethics set forth in the College's *Center Scope* guidance manual. Dr. Fletcher also stated that he supported the initiation of disciplinary action against Plaintiff due to Plaintiff's misconduct and failure to maintain the proper level of professional standards. On February 14, 1995, Plaintiff sat in the last row of Dr. Bowles' class, and was asked to leave.

On February 15, 1995, Plaintiff wrote a letter to Dr. Lynch acknowledging his violation of the "last row rule" and complaining about being asked to leave Dr. Fletcher and Dr. Bowles' classes. The next day, Dr. Lynch responded to Plaintiff's letter with written notice that, in his opinion, Plaintiff's actions "represent[ed] misconduct and unethical and unprofessional behavior, as defined in *Centerscope 1994-95*, page 74" and, for that reason, he had asked Dr. Robbins (Chair of the Academic Status Committee) to convene the committee to determine whether Plaintiff's conduct warranted appropriate disciplinary action and penalties. Dr. Lynch also stated that he would inform Plaintiff of when and where the Academic Status Committee was going to meet to address the issue of Plaintiff's conduct, and that he would also inform Plaintiff of his rights and responsibilities attendant to the meeting.

A meeting of the Academic Status Committee was scheduled for March 1, 1995, for the purpose of conducting a hearing on Plaintiff's behavior in violating the "last row rule," and Plaintiff was given notice of this meeting via a letter sent by Dr. Robbins on February 21, 1995. Thereaf-

ter, in a letter dated February 27, 1995, addressed to Dr. Fletcher and indicating that a copy had been sent to Dr. Bowles, Plaintiff acknowledged that he was aware of the scheduled meeting, and agreed, under protest, to move forward one row in the classroom until the meeting. Plaintiff also stated in this letter that the reason he wished to sit in the last row was because he could see better and had fewer distractions which increased his concentration and enhanced his learning.

The minutes from the March 1, 1995, meeting of the Academic Status Committee indicate that Plaintiff was given an opportunity to be heard, was fully aware of the charges against him, and was allowed to fully respond. Plaintiff alleged that he desired to sit in the last row because he could see and hear better in that location, and that he found sitting elsewhere to be disruptive to his thinking process. Plaintiff stated that he perceived the dispute over his decision to sit in the last row as a "power struggle" between him and the professors, and refused to comply with rule, especially since he had informed the professors how he felt about the issue. Plaintiff was allowed to make his assertions out of the presence of Dr. Lynch and Dr. Bowles.

The minutes also indicate that Dr. Lynch stated that, because Plaintiff had been informed on numerous occasions that he was obligated to follow the rules of the College and yet chose to disregard them, he felt that Plaintiff's actions rose to the level of a knowing, premeditated decision to defy rules and regulations of the College. In addition, the minutes indicate that Dan Pence (a member of the Academic Status Committee by virtue of his office as President of the first-year dental class), informed the Committee that Plaintiff had been a mild distraction to the class, and that "he ha[d] communicated to Mr. Salehpour that the class, as a whole, d[id] not agree with his pursuit of this."

The minutes then indicate that:

> It was pointed out that Mr. Salehpour is an older student and might find certain rules restrictive

> and inappropriate. He is an engineer who has decided on dentistry as a profession. However, concern was expressed that if this was Mr. Salehpour's reaction to sitting in the back row of a classroom, how will he react in the clinic with patients under more restrictive and stressful situations.

(J.A. at 219). With this and the other testimony in mind, the Committee consensus was that Plaintiff was guilty of misconduct, and unprofessional and unethical behavior. The Committee decided that a letter of severe reprimand would be sent to Plaintiff and that the letter would be incorporated into his academic record. In addition, it was decided that Plaintiff would be required to apologize in a timely fashion to his professors and classmates for the disruptive episodes during educational periods. Finally, it was decided that Plaintiff would be placed on disciplinary probation for the entirety of his matriculation at the College, and warned that he would be dismissed if found guilty of other academic infractions.

Thereafter, in a letter dated March 7, 1995, sent to Dr. Bowles, Plaintiff stated that he would not sit in the last row at least until such time that a final decision could be rendered regarding the Committee's recommendations, and any appeal that may be necessary could be heard. Plaintiff explained that his actions were still under protest, and that he desired to sit in the back row so that he could see and hear better, which ultimately enhanced his learning.

On March 17, 1995, Dr. William Slagle (Dean of the College of Dentistry) accepted the Committee's recommendations, and sent a letter to Plaintiff forming [sic] him of the Committee's final decision as well as his right to an appeal. Plaintiff requested an appeal of the final decision to the Ad Hoc Appeals Committee. Dr. Slagle granted the request for the appeal, urged Plaintiff to submit "objective information" that supported Plaintiff's perceived need for sitting in the last row, and asked Plaintiff to suggest three dates that would be convenient for him to appear before the Appeals Com-

mittee. Plaintiff replied with three possible dates and times convenient for him, Dr. Slagle chose one of the dates, and Plaintiff's appeal to the Ad Hoc Appeals Committee ensued on April 18, 1995.

Plaintiff appeared at the appeal and was allowed to speak out of the presence of Dr. Lynch. Thereafter, the Appeals Committee affirmed the decision against Plaintiff with modifications, and Slagle informed Plaintiff of the outcome of his appeal by way of letter dated May 4, 1995. Four days later, Plaintiff sent Dr. Slagle a letter informing him that Plaintiff was voluntarily withdrawing from the College. Despite his voluntary withdrawal from the College, Plaintiff still submitted appeals to Joseph E. Johnson (President of the University) and William R. Rice (Chancellor of the University), which were subsequently denied.

Plaintiff filed suit against Defendants alleging ethnic discrimination pursuant to 42 U.S.C. § 1981 and Title VI, 42 U.S.C. § 2000d *et seq.*; these claims were set out separately and incorporated by reference into Plaintiff's claims brought pursuant to 42 U.S.C. § 1983. Plaintiff's claims brought under § 1983 included ethnic discrimination constitutional violations (free speech claim under the First Amendment, and due process and equal protection claims under the Fourteenth Amendment), and conspiracy. Plaintiff also filed claims against Defendants under the ADA and Rehabilitation Act, as well as ancillary state law claims for emotional distress. Plaintiff alleged that he was discriminated against because of his national origin, physical disability, and protest against the classroom rule prohibiting first-year dental students from sitting in the last row of certain classes. Thereafter, Defendants filed their Motion to Dismiss or for Summary Judgment along with affidavits from Chancellor Rice and President Johnson.

On March 10, 1997, the district court entered an "Order Granting Defendants' Motion for Summary Judgment on Plaintiff's Federal Claims and Dismissing Without Prejudice Plaintiff's State Law Claims." Plaintiff filed a motion for reconsideration of the district court's order, which was

denied on April 11, 1997. This appeal ensued.

DISCUSSION

I.

Plaintiff first argues that the district court improperly adjudicated Defendants' motion to dismiss as a motion for summary judgment. Specifically, Plaintiff claims that the district court erred in granting Defendants summary judgment on his claims brought pursuant to Title VI, § 1981, and § 1983, as well as the ADA and the Rehabilitation Act, because Defendants failed to move in the alternative for summary judgment on these claims. We disagree.

In *Employers Insurance of Wausau v. Petroleum Specialities, Inc.*, 69 F.3d 98, 105 (1995), this Court stated a district court's decision to impose summary judgment *sua sponte*, and without notice, must be reviewed under two separate standards of review. "The substance of the district court's decision must of course meet the normal standards for summary judgement [sic]. However the procedural decision to enter summary judgment *sua sponte* must also be reviewed to determine if the court abused its discretion by entering the judgment on its own motion." *Id.* Accordingly, we will review the substance of the district court's decision regarding Defendants' motion *de novo, see Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997), while reviewing the district court's procedural decision to enter summary judgment *sua sponte* for an abuse of discretion. *Petroleum Specialities, Inc.*, 69 F.3d at 105.

Defendants entitled their motion as a "Motion to Dismiss or for Summary Judgment," where all Defendants moved under Fed. R. Civ. P. 12(b)(6) to dismiss all claims, except for Rice and Johnson, who moved in the alternative for summary judgment under Fed. R. Civ. P. 56. Defendants Rice and Johnson submitted affidavits and various letters along with the motion to support their claim. In response to Defendants' motion, Plaintiff filed his response and approximately two-hundred pages of supporting materi-

als. Specifically, Plaintiff submitted significant portions of the *"Center Scope 1995-95* Student Handbook along with various other materials. (J.A. at 134-175). Thereafter, on March 10, 1997, the district court granted summary judgment to all defendants, almost eleven months after the motion was filed.

There is no per se prohibition on a district court entering summary judgment *sua sponte*. *Petroleum Specialities, Inc.*, 69 F.3d at 104. As noted by the Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986), "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." A district court can enter summary judgment *sua sponte* in certain circumstances; however, the most obvious example is when a district court considers materials outside the pleadings when ruling on a motion to dismiss brought under Rule 12(b)(6). *See* Fed. R. Civ. P. 12(b)[2]. Whether notice of conversion of a motion to dismiss to one for summary judgment by the court to the opposing party is necessary depends upon the facts and circumstances of each case. *Dayco Corp. v. Goodyear Tire & Rubber Co*, 523 F.2d 389, 393 (6th Cir. 1975). Where one party is likely to be surprised by the proceedings, notice is required. *Id.*

Here, Plaintiff contends that, because the district court failed to provide him notice of its decision to convert Defendants' motion to dismiss brought under Rule 12(b)(6) to one for summary judgment (with respect to those nineteen defen-

---

[2]Rule 12(b) states:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

dants who failed to expressly move in the alternative), he was not given a reasonable opportunity to respond to such matters. However, because Plaintiff not only *had* ample time to respond to Defendants' motion, but actually *did* respond with over two hundred pages of materials, Plaintiff's contention flies in the face of logic and reason. We are not persuaded otherwise by Plaintiff's claim that the materials he submitted simply were in response to the affidavits and materials submitted by Rice and Johnson when they filed their alternate motion under Rule 56.

First, the voluminous materials submitted by Plaintiff go well beyond responding to the affidavits submitted by Rice and Johnson. These two Defendants filed an alternative motion for summary judgment with supporting affidavits for the purpose of showing their very limited involvement in Plaintiff's case. The record indicates that the more than two-hundred pages from the *Center Scope* Student Handbook as well as other materials filed by Plaintiff concerned far more than allegations made by Rice and Johnson. Instead, the materials address those claims Plaintiff brought against the Defendants as a whole. Indeed, based upon the record presented and the facts surrounding this case, Plaintiff could have submitted few other materials in response to Defendants' motion. The information provided in the *Center Scope* Student Handbook addresses Plaintiff's claims in terms of the rights afforded him at the University and whether Defendants' actions violated those rights. Therefore, Plaintiff did, in fact, respond to a motion for summary judgment against all Defendants, and accordingly cannot be said to have been surprised by the district court's conversion. *See Dayco*, 523 F.2d at 393.

In addition, the record indicates that Plaintiff had ample opportunity to respond to Defendants' motion and any materials submitted therein. Specifically, the record indicates that the district court did not rule on Defendants' motion until approximately eleven months after it was filed. In *Fugarino v. Hartford Life & Accident*, 969 F.2d 178, 182-83 (6th Cir. 1992), this Court held that the district court's grant of summary judgment was proper despite its failure to pro-

vide the Plaintiffs with notice of its decision to rely on matters outside the pleadings, where the Plaintiffs had approximately two years to respond to any evidence submitted by the Defendants. Therefore, where Plaintiff had eleven months to respond in the instant case, the district court did not abuse its discretion in considering matters outside the pleadings and converting Defendants' motion to dismiss to one for summary judgment. *Id.*

II.

Plaintiff next argues that the district court erred in granting summary judgment on Plaintiff's § 1981 claim brought against Rice and on the issue of whether Rice and Johnson had any personal involvement in the alleged constitutional violations. Plaintiff raises three arguments in connection with this issue. We disagree with each of Plaintiff's claims.

1.) Whether the district court erred in granting summary judgment to Rice and Johnson where these two Defendants failed to comply with Local Rule 11(d) of the United States District Court for the Western District of Tennessee.

Plaintiff claims that the district court erred in granting Rice and Johnson's motion for summary judgment, where these Defendants failed to comply with Local Rule 11(d) of the United States District Court for the Western District of Tennessee. Specifically, Plaintiff claims that Rice and Johnson were in noncompliance with this Rule because they failed to enumerate each material fact alleged. Defendants claim that, although they technically failed to comply with this local rule, they nonetheless complied with the purpose of the rule (to make the opposing party aware of the material issues presented), by enumerating the paragraphs in their corresponding affidavits, which thereby set forth the facts to which Plaintiff was to respond.

In *United States v. Kingston*, 922 F.2d 1234, 1240 (6th Cir. 1990), this Court stated that it would not deviate from its ordinary practice of declining to enforce local rules when

a district court failed to do so. Recently, in *Stough v. Mayville Community Schools*, 138 F.3d 612, 615 (6th Cir. 1998), this Court reversed the district court's dismissal of a case on the motion for summary judgment within the ten-day time allotment as set forth in Eastern District of Michigan Local Rule 7.1(c). In doing so, this Court noted that a claim (or motion) should only be dismissed for failure to follow a local rule in extreme circumstances. *Id.* at 614-15. We do not believe that the facts of this case present such extreme circumstances.

2.) Whether the district court erred in summarily dismissing Plaintiff's claims brought under Title VI and § 1981 against Rice, where Rice failed to follow procedural requirements in conjunction with his motion and where genuine issues of fact remained on this issue.

In reference to Plaintiff's Title VI and § 1981 claims addressing ethnic discrimination, Rice submitted his affidavit in support of the following statement made in the Memorandum of Law in Support of the Motion for Summary Judgment:

> Indeed, even if an inference of animus could be attributed to all members of the Appeals Committee, that body was authorized only to make a recommendation to Dean William Slagle of the College of Dentistry, who was the decision maker in this matter.

(Memorandum of Law in Support of Defendants' Motion to Dismiss and/or Summary Judgment, p. 7; J.A. 96.) Plaintiff claims that, because Rice did not file an affidavit from Dean Slagle in support of this statement, the district court should not have granted Rice summary judgment. In addition, Plaintiff also claims that, through the materials that he submitted in response to Rice's motion for summary judgment, Plaintiff established that a genuine issue of material fact remained for trial on these claims.

Plaintiff's contention regarding Rice's failure to support

his statement with an affidavit from Slagle amounts to nothing more than form over substance, where Plaintiff is essentially postulating the same argument that was made regarding Local Rule 11. Accordingly, Plaintiff's argument on this issue is without merit. In addition, although Plaintiff contends that the materials he submitted in response to Defendants' motion for summary judgment created a genuine issue of fact regarding his claims brought under Title VI and § 1981 for ethnic discrimination, he fails to state what those issues of fact are, and why the issues of fact would be sufficient to go forward with these claims. As such, Plaintiff waived this issue for appellate review. *See Figueroa-Rubio v. Immigration & Naturalization Serv.*, 108 F.3d 110, 112 (6th Cir. 1997)(holding that where an appellant fails to support his claim with authority, this Court will decline review).

3.) Whether the district court erred in summarily dismissing Plaintiff's claims brought against Rice and Johnson under § 1983 on the basis that these two Defendants did not have any personal involvement in a constitutional violation.

Plaintiff contends that, although the district court did not specifically address this issue, it did so in effect when it granted summary judgment against all Defendants on this claim. Plaintiff claims that Rice and Johnson erroneously maintain that they could not be held liable based on *respondeat superior* liability, because Plaintiff never alleged such a form of liability.

We are not persuaded by Plaintiff's argument where his allegations against Rice and Johnson under the § 1983 claim amount to *respondeat superior* liability. The fact that Plaintiff did not couch his claim in such terms does not change the substance of the allegation (these two Defendants in their official "supervisory" capacity failed to prevent the alleged constitutional violations). Furthermore, Plaintiff relies upon case law based upon *respondeat superior* liability to support his claim. Therefore, once again, Plaintiff's hollow argument amounts to nothing more than form over substance. However, to the extent that Plaintiff's claim is considered on the merits, the claim must fail.

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). In *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (1989), this Court embraced the proposition that supervisory liability under § 1983 cannot attach where the allegation of liability is based upon a mere failure to act. Instead the liability must be based upon active unconstitutional behavior. *Id.*

Here, Rice and Johnson submitted affidavits of their lack of personal involvement in Plaintiff's allegations of constitutional violations. A review of these affidavits indicates that Rice and Johnson did not participate at any level of Plaintiff's disciplinary process until his appeal. (J.A. at 34, ¶¶ 3-4; 42-44, ¶¶ 3-10). These Defendants specifically state in their affidavits that they had no personal knowledge of the alleged constitutional violations (discrimination based upon ethnicity) until the time the alleged violation occurred. (J.A. at 35, ¶ 6; 43-44, ¶ 8.)

In response to these affidavits Plaintiff submitted voluminous portions of the Student Handbook along with letters submitted *after* he voluntarily left the University and filed suit. Plaintiff claims that a review of these materials indicates that these Defendants knew of his disability and played an active role in the alleged discrimination. We disagree and find Plaintiff's claim to be disingenuous, at best. Interestingly, the ***first time*** Plaintiff specifically references his alleged disability (head, neck, and spinal problems that necessitated his being seated in the last row of the classroom) was in his letter dated May 8, 1995, by which he resigned from the College. However, despite this inconsistency, (i.e., that Defendants could not knowingly have discriminated against Plaintiff based upon his disability if they were not aware of the same until *after* he resigned), the materials submitted by Plaintiff do nothing more than support Rice and Johnson's affidavits. For example, the portions of the Student Handbook do not indicate these Defendants' involvement, and the letters submitted by Plaintiff purport to indi-

cate the active role the other Defendants may have played in the disciplinary process, but fail to show any involvement by these Defendants.

As stated above, in order for liability to attach to Rice and Johnson for the alleged § 1983 violations, Plaintiff had to prove that they did more than play a passive role in the alleged violation or showed mere tacit approval of the events. *Leach*, 891 F.2d at 1246. Liability under this theory must be based upon more than a mere right to control employees and cannot be based upon simple negligence. *Id.* Plaintiff must show that Rice and Johnson otherwise encouraged or condoned the actions of the other Defendants. *See Copeland v. Machulis*, 57 F.3d 476, 481 (6th Cir. 1995). As such, where the materials submitted by Plaintiff in response to Rice and Johnson's motion for summary judgment failed to show, *in an respect*, that these two Defendants encouraged or condoned any alleged constitutional violations, the district court properly granted the motion for summary judgment. *Id.*

III.

Plaintiff also argues that the district court erred in granting summary judgment on his procedural due process claim brought pursuant to § 1983 against all Defendants. We disagree.

Plaintiff argues that Defendants denied his constitutional right to procedural due process under the Fourteenth Amendment when they failed to give his motion of the specific charges against him. Plaintiff claims that the broad terms used by Defendant such as "misconduct," "unethical," and "unprofessional" did not afford his adequate notice under the Fourteenth Amendment.

The "root requirement" of due process is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Purisch v. Tennessee Tech. Univ.*, 76 F.3d 1414, 1423 (6th Cir. 1996)(quoting *Boddie v. Connecticut*, 401 U.S. 371, 379; 91 S.Ct. 780, 786

(1971)). "'The formality and procedural requisites for the hearing can vary, depending upon the importance of the interest involved and the nature of the subsequent proceedings.'" *Id.*(quoting *Boddie*, 401 U.S. at 379).

Assuming that Plaintiff had a protected property interest in pursuing his education at the University, it was Plaintiff, not Defendants, who chose to terminate that property right. Defendants reprimanded Plaintiff by placing a letter in his personnel file; however, Defendants in no way expelled Plaintiff from the University. Plaintiff voluntarily gave up his property right. However, to the extent that one could argue that Plaintiff may have been "constructively" expelled, we believe that Defendants more than afforded Plaintiff his procedural process rights.

Plaintiff knew that the misconduct for which he was accused consisted of his failure to follow the "last row" rule, and the corresponding classroom disruption. It was Plaintiff's own complaints regarding the "last row" rule and the professors' requests for Plaintiff to leave the classroom when he persisted in sitting in the last row that precipitated the Academic Status Committee meeting. Furthermore, the minutes from the March 1, 1995, meeting of the Academic Status Committee indicate that Plaintiff was given an opportunity to be heard, was fully aware of the charges against him, and was allowed to fully respond. (J.A. at 215-19). Therefore, we conclude that Plaintiff was fully aware of the specific reasons for which he was ultimately reprimanded, and that his due process rights were not violated.

IV.

Plaintiff's final argument is that the district court erred in granting qualified immunity to the Defendants in their individual capacities, where the Defendants violated Plaintiff's right to free speech. We disagree.

Plaintiff argues that the district court erred in granting qualified immunity to the Defendants named in their individual capacities on the basis that these Defendants did not

violate his clearly established right to free speech. Plaintiff contends that he had a protected right to free speech under existing federal law that a reasonable person (particularly a reasonable person employed in the capacity of these Defendants) would have known about based upon the *Center Scope* Student Handbook which states: "It is the right and responsibility of the individual student or groups of students to be interested in and to question the policies, regulations, and procedures affecting them." (J.A. at 143). Plaintiff therefore alleges that Defendants retaliated and disciplined him when he exercised his right to free speech.

Government officials who perform discretional functions are entitled to qualified immunity from civil damages suits arising out of the performance of their official duties unless they violation "'clearly established constitutional rights of which a reasonable person would have known.'" *Purisch*, 76 F.3d at 1423 (quoting *Christophel v. Kukulinsky*, 61 F.3d 479, 484 (6th Cir. 1995)). "The threshold inquiry in a qualified immunity analysis is whether a constitutional violation has occurred at all." *Purisch*, 76 F.3d at 1423. In other words, only if it is found that a constitutional violation has occurred would the Court then examine whether the violation involved "clearly established constitutional rights of which a reasonable person would have known." *Id.*

As noted by Defendants, it has been found that, "conduct by the student, in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior -- materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not speech." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 513 (1969). As such, we find that, here, Plaintiff's claim fails at the inception where his alleged speech, i.e., his conduct of disrupting the classroom milieu for the sole purpose of advancing the pursuing his admitted "power struggle" with the University, was not protected activity. *Id.*

We cannot convey strongly enough that the purpose of this holding is not to discourage legitimate debate that is demonstrable or constitutes the vigorous expression of ideas in

an academic setting, even when that expression may impose inconveniences. Indeed, the First Amendment right to freedom of expression of political, social, religious, and other such views may be most precious in an educational setting. However, as in the instant case, where the expression appears to have no intellectual content or even discernable purpose, and amounts to nothing more than expression of a process, such expression is not protected and does violence to the spirit and purpose of the First Amendment. *Tinker*, 393 U.S. at 511. The rights afforded to students to freely express their ideas and views without fear of administrative reprisal, must be balanced against the compelling interest of the academicians to educate in an environment that is free of purposeless distractions and is conducive to teaching. Under the facts of this case, the balance clearly weights in favor of the University.

Accordingly, Plaintiff's claim fails to present a constitutional violation because Plaintiff's conduct did not constitute protected speech. As such, the issue of qualified immunity need not be further explored, and it may be concluded that the district court properly granted Defendants' motion for summary judgment. *Purisch*, 76 F.3d at 1424.

CONCLUSION

For the above stated reasons, we **AFFIRM** the district court's order granting summary judgment in favor of Defendants.[3]

---

[3]Because we find that the district court properly dismissed Plaintiff's federal claims, we conclude that the court was correct in declining to review Plaintiff's pendent state law claims. *See Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1254-55 (6th Cir. 1996.)

APPENDIX B -- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED OCTOBER 29, 1998

97-5468

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMAD SALEHPOUR, Plaintiff-Appellant, v. UNIVERSITY OF TENNESSEE, ET AL. Defendants-Appellees.	ORDER

BEFORE: NELSON, BOGGS, and CLAY, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for hearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX C -- ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE AT MEMPHIS FILED MARCH 10, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SAMAD SALEHPOUR,

Plaintiff,

v. CASE NO. 96-2217-D/V

UNIVERSITY OF TENNESSEE, et al.

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FEDERAL CLAIMS AND DISMISSING WITHOUT PREJUDICE PLAINTIFF'S STATE LAW CLAIMS

Defendants, through their counsel, move the court under Fed. R. Civ. P. Rule 56(b) for summary judgment in a lawsuit brought by a former student at the University of Tennessee's ("UT") College of Dentistry. Plaintiff asserts a myriad of federal and state law claims stemming from UT officials' decision to bring academic disciplinary charges against him for misconduct and unethical behavior. This court has jurisdiction pursuant to 28 U.S.C. § 1331 and § 1367.

I. BACKGROUND

This entire lawsuit revolves around a power struggle between Samad Salehpour, a student at UT's dentistry college

who began his studies in August 1994, and several professors who asked Mr. Salehpour not to sit in the back row of their classes, a violation of an apparently unwritten rule enforced by only a few academics. Plaintiff challenged this policy, both in class and in written communications with various UT administrators. As a result of his refusal to follow the "back row" policy and his actions in pursuing his complaints, Plaintiff was charged with violating the dentistry school's standards of professional conduct. After a hearing in which Mr. Salehpour was permitted to present his side of the story, the school's Academic Status Committee found his guilty of "misconduct" and unethical and unprofessional behavior and approved a motion to place a letter of reprimand in his academic record. (Certificate of Samad Salehpour at 37, 39-43).

The trouble began Dec. 31, 1995, when Mr. Salehpour sat in the back row of Professor William Bowles' class and was asked to move up. Professor Bowles was chairman of the college's prosthodontics department at the time. Plaintiff apparently refused this request. The next day, Professor Bowles and Denis Lynch, the executive associate dean of the college of dentistry, told Plaintiff in a meeting that the back row seating policy "is not an unreasonable request by Dr. Bowles and that it was not an issue for discussion since Dr. Bowles had every right to tell students where to sit in his class." (Id. at 39).

In a follow-up letter to Dr. Bowles on February 6, Plaintiff reiterated his opposition to the seating policy and also complained that the college's dress code for students was "too restrictive." (Id. at 67.) Dean Lynch found several comments in Plaintiff's February 6 letter to be "unprofessional," according to the minutes of the March 1 disciplinary hearing. (Id. at 40.) On February 9, Professor Bowles wrote a reply to Plaintiff in which he noted that Mr. Salehpour had sat in the back row, despite having the policy explained to him three days earlier, and warned him not to do it again.

The back row dispute escalated on February 13, when

Mr. Salehpour sat in the back of Professor Victor Fletcher's class and was asked to move. In a letter describing the incident, Professor Fletcher stated that Plaintiff "replied that he was 'comfortable' and did not want to move his seat." (Id. at 65.) Mr. Salehpour refused to change seats, then walked out after being told that leaving was his only other option. (Id.) This occurred while a guest lecturer attempted to instruct the class. Professor Fletcher immediately wrote a letter to the dean, citing the student handbook Center Scope and recommending disciplinary action:

> [Plaintiff] failed to comply with directions of a University official acting in performance of his duties, obstructed and disrupted teaching, was disorderly in his conduct, and violated his professional ethics in dealing with a member of the dental community. (Standards of Conduct, *Center Scope* 1994-95, page 74) ... [H]is actions bring disrepute and disgrace upon both himself and the profession, which substantially reduce his ability to effectively practice the profession for which he sought admission. (Maintenance of Ethical and Professional Standards of the Health Professions, *Center Scope*, page 74)

(Id. at 65-66). On February 16, Dean Lynch informed Mr. Salehpour that his actions "represent misconduct and unethical and unprofessional behavior" and that the Academic Status Committee would meet to review Plaintiff's actions.

The eight-member committee, composed entirely of faculty members, heard from Mr. Salehpour, Dean Lynch and Dr. Bowles, and passed a motion finding Sam Salehpour "guilty of misconduct, unprofessional and unethical behavior" and requiring a "letter of severe reprimand" be placed in his file. In addition, Plaintiff was required to apologize to various instructors, the dean and his classmates. Finally, the committee recommended placing him on "disciplinary probation" and warned him that he would be dismissed if found guilty of other "academic infractions." (Id. at 43).

On February 17, Dean William Slagle upheld the committee's findings and placed Plaintiff on administrative probation for the remainder of his degree program. Plaintiff unsuccessfully pursued an in-college appeals process. Plaintiff withdrew from UT's dental school on May 8, 1995. In his resignation letter, he mentioned for the first time that he had "nerve problems" in his neck and back due to a gruesome stabbing he received in 1984 while attending college in California. As a result of being forced to sit elsewhere than in the back row, he claimed to have suffered "numbness" in his arm and "severe headaches" and tension and pain in his neck and back. (Id. at 1.)

Mr. Salehpour filed this lawsuit on February 14, 1996, claiming university officials discriminated against him on the basis of his Iranian citizenship and disability and deprived him of due process in pursuing the academic charges against him. He also claimed that UT officials had abridged his right to free speech, conspired to deprive him of his civil rights and tortiously caused him to suffer emotional distress.

II. SUMMARY JUDGMENT

Defendants style their motion as one to dismiss and/or for summary judgment. As both parties have relied on matters outside the pleadings, the court will treat Defendants' motion as one for summary judgment in accordance with Rule 12(b).

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The court also may consider any material that would be admissible or usable at trial, including exhibits that have been properly made a part of an affidavit. 10A Charles A. Wright et al., Federal Practice and Procedure § 2721, at 40, § 2722, at 56 (2d ed. 1983). The evidence and inferences based on facts must be viewed in light most favorable to the nonmoving party, in this case the plaintiff. Kochins v.

Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986).

Summary judgment is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party can meet its initial burden of proving that no material facts exist by showing there is a lack of evidence to support the nonmoving party's case, id. at 325, which it can do by submitting affirmative evidence negating an essential element of the nonmoving party's claim, or by attacking the opponent's evidence to show why it does not support a judgment for the nonmoving party. 10A Charles A. Wright et al., Federal Practice and Procedure § 2727, at 35 (2d ed. Supp. 1996). The moving party need not present affidavits or new evidence of its own to meet the initial burden but may base its motion on an attack of the opponent's evidence. Id.

Once a properly-supported motion for summary judgment is made, the nonmovant "may not rest upon the mere allegations or denials of [its] pleadings," Fed. R. Civ. P. 56(e), but must -- by affidavits or other evidence -- "come forward with some probative evidence to support its claim and make it necessary to resolve the differences at trial." Boyd v. Ford Motor Co., 948 F.2d 283, 285 (6th Cir. 1991), cert. denied, 112 S.Ct. 1481 (1992). A genuine issue for trial exists if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Significantly, the party opposing the motion "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

III. JURISDICTION

The Eleventh Amendment is a constitutional limitation on the federal courts' subject matter jurisdiction, barring suits against states in federal court brought by private citizens unless the state has expressly waived the protection.

Edelman v. Jordon, 415 U.S. 651, 662-63 (1974). As Defendants note, this immunity applies regardless of whether retrospective or prospective relief is sought. See Seminole Tribe of Fla. v. Florida, 116 S.Ct. 1114, 1124 (1996). State agencies, including state university systems, likewise qualify for Eleventh Amendment protection in the Sixth Circuit. See Martin v. University of Louisville, 541 F.2d 1171, 1174 (6th Cir. 1976).

Under Supreme Court precent, the Eleventh Amendment bars § 1983 lawsuits against state governments and their agencies, Quern v. Jordan, 440 U.S. 332, 345 (1979), although it does not bar suits against state officers in their "official" capacities so long as the plaintiff does not seek money damages. Ex parte Yound, 209 U.S. 123, 159-60 (1908). Mr. Salehpour, who seeks among other things reinstatement to the university's dentistry school and a declaration that his rights have been violated, has sued UT's president and chancellor, the dean of the college of dentistry and the school's affirmative action director in their official capacities. Plaintiff thus seeks injunctive and declaratory relief, which is permitted, so long as the relief would not be in the form of a direct payment of state funds. Edelman, 415 U.S. at 662-63.

This result is not changed by the fact that states and their agencies are not "persons" within the meaning of § 1983. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). When sued for injunctive relief, a state official in his or her official capacity is a person for § 1983 purposes because such actions "are not treated as actions against the State." Id. at 71, n.10. Plaintiff's claims for compensatory and punitive damages for the alleged violations of his constitutional rights are barred, although he may college under a "color of state law" theory in his suit against those UT administrators and professors who he sued as "individuals." See Kentucky v. Graham, 473 U.S. 159, 166 (1985).

Finally, the Supreme Court has stated that § 1983 "provides the exclusive federal damage remedy for the violation of rights guaranteed by § 1983 when the claim is pressed

against a state actor." Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 735 (1989). Thus, Plaintiff's § 1981 claims for monetary relief against the University of Tennessee or its officials are barred. Of course, rights created by § 1981 may be enforced via § 1983 lawsuits for prospective relief brought against state officials in their official capacities. Id. at 733; see also Chai v. Michigan Tech. Univ., 493 F.Supp. 1137, 1148 n.13 (W.D. Mich. 1980) (noting that § 1981 and § 1983 are "in pari materia").

IV. SECTION 1983

Plaintiff seeks relief under 42 U.S.C. § 1983 for a myriad of deprivations under federal law and the U.S. Constitution. As there is no dispute that Defendants were acting under color of state law, the issue is whether Mr. Salehpour was deprived of a constitutionally cognizable right. See Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155-56 (1978). The court finds that no genuine material facts support Plaintiff's claims of a constitutional violation.

A. Due Process

There is no right to due process unless a constitutionally protected property or liberty interest is at stake. See Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972). Plaintiff's complaint alleges university officials denied him due process when they brought disciplinary charges against him, and then voted to place a letter of reprimand in his academic record, put him on "disciplinary probation" and warn him that dismissal could result if he continued his disruptive behavior. Adverse academic decisions that fall short of dismissal or suspension arguably implicate liberty or property interests protected by the Fourteenth Amendment. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the Clause must be satisfied" Goss v. Lopez, 491 U.S. 565, 574 (1975) (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

On the other hand, the Supreme Court has not ad-

dressed definitively whether a student has a constitutionally protected interest in continued enrollment at a public university, see Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 223 (1985), let alone whether probationary enrollment that carries with it no consequences in terms of a student's curriculum or ability to earn credits toward graduation triggers the Fourteenth Amendment's due process protections. As one appeals court noted, merely removing one "stick" from the "bundle of diverse situations to which the students are subjected [at an academic institution] . . . does not necessary mean that a constitutionally protected right of a student has thereby been violated." Colorado Seminary v. NCAA, 570 F.2d 320 321 (10th Cir. 1978) (holding that participation in intercollegiate athletics does not rise to the level of a constitutionally-protected property or liberty interest). But even assuming the existence of a protected property or liberty right, the court finds that Plaintiff has failed to show that there is a genuine dispute concerning whether Mr. Salehpour received due process.

Notice and an opportunity to be heard constitute the foundation of procedural due process. Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970). Due process is not a fixed concept, but rather a "flexible standard which varies depending on the nature of the interest affected, and the circumstances of the deprivation." Gorman v. University of Rhode Island, 837 F.2d 7, 12 (1st Cir. 1988). As one early case noted, due process "does not impose an unattainable standard of accuracy." Grannis v. Ordean, 234 U.S. 385, 395 (1914).

It is uncontested that Mr. Salehpour received both notice of the Academic Status Committee's meeting, (Pl.'s Mem. in Response to Defs.' Mot. Ex. B at 24), and an opportunity to present his side of the story. (Certificate of Samad Salehpour at 39, 41-43). Plaintiff claims he did not receive notice as required by the university's judicial procedures. (Compl. ¶ 48). Procedural due process requirements are governed by federal constitutional law, not state law. Black v. Parke, 4 F.3d 442, 447 (6th Cir. 1993). Thus, a mere violation of a state or state entity's formal procedures does not implicate the Due Process Clause so long as the basic consti-

tutional standard is honored. Purisch v. Tennessee Tech. Univ., 76 F.3d 1414, 1423 (6th Cir. 1996). Because the university accorded Plaintiff more than the minimum process the Consitution requires, Plaintiff cannot sustain his claim for a due process violation.[1]

B. Equal Protection.

Plaintiff recounted a few incidents in which he claims professors treated him differently from similarly situated "nonminority" students. He stated, for example, that a Caucasian student who sat in the back row in Professor Bowles' class was not required to move until Plaintiff also sat in the back row and that the professor did not enforce the college's dress code as strictly against white students as he did against Plaintiff. (Compl. ¶¶ 31, 40.) In his resignation letter to the dean of the dentistry college, Plaintiff also stated that nonminority students were not asked to move when they sat in the back row. (Pl.'s Mem. in Response to Defs.' Mot. for Summ. J. Ex. B at 2).

The Sixth Circuit has recognized the awkwardness of analyzing an equal protection claim arising from official action that was not based on any classification established by a rule, ordinance or statute. "Typically, equal protection

---

[1]Based on Plaintiff's observation that the student-university relationship is contractual in nature and his citation of Board of Curators v. Horowitz, 435 U.S. 78 (1978), he appears to be claiming that Defendants' actions were "arbitrary" and thus a violation of substantive due process. See Ewing v. Board of Regents of the Univ. of Mich., 742 F.2d 913, 915 (6th Cir. 1984). Under Sixth Circuit precedent, no due process violation lies unless "there is no rational basis for the University's decision, or that the decision . . . was motivated by bad faith or ill will" unrelated to the conduct with which Plaintiff was charged. Stevens v. Hunt, 646 F.2d 1168, 1170 (6th Cir. 1981). As the preceding discussion clearly demonstrates, Defendants' actions were reasonable and in no way arbitrary or irrational. No genuine issue of material fact has been raised to suggest the Academic Disciplinary Committee's decision was "a substantial departure from accepted academic norms." Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985).

actions apply to legislative enactments," the key inquiry being whether the law or rule impermissibly classified people according to a particular characteristics, such as race. Pendleton v. Jefferson Local Sch. Dist. Bd. of Educ., No. 91-3126, 1992 WL 57421, at *8-9 (6th Cir. March 25, 1992).[2] Equal protection "'deals with legislative line drawing; procedural due process deals with the adjudication of individual claims.'" Id. at *9 (Guy, J. concurring) (quoting 3 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 18.2, at 7-8 (1992)). As explained by Professors Rotunda and Nowak,

> Equal protection is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same. In reviewing any classification it must be determined whether or not the persons *classified by the law for different treatment* are in fact "dissimilar." The question relates to the bases upon which the government can distinguish between individuals in society.

Rotunda & Nowak, supra, § 18.2, at 8 (emphasis added); see also Richmond v. J.A. Croson Vo., 488 U.S. 469, 491 (1989) ("[T]he Framers of the Fourteenth Amendment . . . desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitation.").

In Pendleton, the court declined to state whether an individualized cause of action such as Mr. Salehpour is claiming exists under the Equal Protection Clause. Pendleton, 1992 W.L 57421, at *9). The court is aware of two ruling in

---

[2]Although citation to unpublished Sixth Circuit rulings is disfavored, this case is referred to in the absence of clear, published case law from this circuit "because it establishes the law governing the present action and 'there is no [Sixth Circuit] published opinion that would serve as well.'" Norton v. Parke, 892 F.2d 476, 479 n.7 (6th Cir. 1989).

this circuit in which equal protection was the basis for a § 1983 violation involving bureaucratic actions taken against individuals. An Ohio district court used the Pendleton approach to analyze a summary judgment motion in a lawsuit involving a disabled teacher's claim that his employer violated his equal protection rights by requiring him to undergo a medical evaluation. Harris v. Board of Educ. of Columbus, 798 F.Supp. 1331, 1344-45 (S.D. Ohio 1992). The plaintiffs in both Pendleton and Harris claimed discrimination on the basis of disability, a situation that favored the defendants because people with disabilities do not constitute a suspect class. Thus, the court in Harris found the school's decision to be "rationally related" to the legitimate government purpose of ensuring a healthy teaching staff. Id. at 1345. However, when it analyzed the teacher's § 1983 claim that his equal protection rights had been violated by the same administrative action based on his *race* (black), the court did not employ a strict scrutiny test, but simply substituted the reasoning of its earlier finding that plaintiff's Title VII racial discrimination claim survived summary judgment. Id.

In addition, this court recently granted a technical school's summary judgment motion based on the Pendleton rationale that the school's decision to suspend an allegedly disabled student was "rationally related" to the legitimate interest in protecting other students who felt threatened by the plaintiff's behavior. Martin v. Lamarr, No. 94-2323, slip op. at 8 (W.D. Tenn. Oct. 18, 1996).

A motion's reflection will reveal that discrimination inevitably would attend any effort to apply the traditional equal protection hierarchy to administrative actions that are not taken pursuant to a rule or regulation that divides people by race, gender or some other protected criteria. A person of color or other member of a suspect class would receive the highest level of protection, a woman or illegitimate person the next highest, and everyone else would be slotted into the low-level "rational basis" category. There is no point in stumbling down this path. Therefore, because UT's ethics/conduct code does not categorize students on the basis of

any suspect criteria, Mr. Salehpour's only arguable equal protection claim is for selective prosecution. See United States v. Hazel, 696 F.2d 473, 474 (6th Cir. 1983).

Plaintiff claims that UT officials or employees discriminated against him on the basis of his country of origin (Iran) by convening a disciplinary hearing and charging him with unprofessional and disruptive behavior for in-class conduct he claims non-Iranian students[3] had engaged in. To make out a prima facie case under a selective prosecution theory, Plaintiff must show "that the government's discriminatory selection of him has been invidious or in bad faith, i.e., based upon constitutional rights." Id. (quoting United States v. Berrior, 501 F.2d 1207, 1211 (2d Cir. 1974)). This is a heavy burden even when resisting a defendant's motion for summary judgment. Abu-Haleb, Inc. v. United States, 658 F.Supp. 453, 458 (N.D. Ohio 1987). See generally Wayte v. United States, 470 U.S. 598, 608-09 (1985) (reestablishing the high burden criminal defendants must satisfy to establish even a prima facie case of selective prosecution).

Plaintiff's evidence of official animus based on his country of birth is purely conclusory. He related only a single incident in which discriminatory behavior could arguably be inferred: Dr. Bowles did not ask a nonminority student to move off the back row until Plaintiff showed up and also sat in the back row. However, Dr. Bowles did not initiate disciplinary charges against Plaintiff; that was the decision of Dean Lynch. On the other hand, a panel composed of eight faculty members who had no direct involvement in the dispute between Mr. Salehpour and Professors

---

[3]Defendants argue that Mr. Salehpour's claim that "white" or "Caucasian" students were treated better cannot form the basis of a *national origin* bias lawsuit. This is a creative argument, but unpersuasive given the burden Defendants carry at the summary judgment stage. In addition, Plaintiff stated in his letter withdrawing from UT's dentistry college that "*American-born* students violate the dress code" without being subjected to the same scrutiny by Professor Bowles. (Pl.'s Mem. in Response to Defs.' Mot. for Summ. J. Ex. B at 2). Plaintiff's equal protection claim still fails, however.

Bowles and Fletcher voted to reprimand Mr. Salehpour for misconduct and unprofessional and unethical behavior based on his consistent refusal to adhere to the back row rule and perhaps the confrontational manner in which he challenged the policy and pursued his other grievances. See discussion infra Part IV.C. A factor in the committee's decision to discipline Plaintiff was the concern "that if this was Mr. Salehpour's reaction to sitting in the back row of a classroom, how will he react in the clinic with patients under more restrictive and stressful situations." (Id.) Even viewing the facts and inferences therefrom in a light most favorable to Plaintiff, Defendants have met their burden to show that no genuine issue of material fact exists establishing that either Dean Lynch's decision to bring academic charges or the Advisory Status Committee's action was motivated by a discriminatory purpose. Summary judgment therefore is appropriate in favor of Defendants on Plaintiff's equal protection/selective prosecution claim. To force the issues of Plaintiff's lawsuit into any other equal protection theory would be "a task to Procrustean to be rationally accomplished." North Carolina v. Pearce, 395 U.S. 711, 723 (1969).

C. First Amendment

Whether a certain activity is entitled to protection under the First Amendment is a question of law. Stern v. Shouldice, 706 F.2d 742, 747 (6th Cir.), cert. denied, 464 U.S. 993 (1983).

The courts have not enunciated a clear standard concerning the permissible limits universities or colleges may place on students' speech while in class. While there is general language in caselaw lauding the classroom as a "marketplace of ideas," see, e.g., Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 512 (1969), there is also "no question of the right of the school officials to prescribe and control conduct in the schools." Bright v. Nunn, 448 F.2d 245, 249 (6th Cir. 1971). The vigor showed by Dean Lunch and other UT officials in disciplining Mr. Salehpour for his complaints is of no interest to this court, so long as he was

accorded at least the minimum process guaranteed by the Fourteenth Amendment and his activities did not "directly and sharply implicate basic constitutional values." Epperson v. Arkansas, 393 U.S. 97, 104 (1968). As the following discussion demonstrates, whether the First Amendment protects Mr. Salehpour's in-class exchanges with his professors and his subsequent actions is a question too debatable to have given the university officials involved reasonable standards around which to structure their behavior. Accordingly, Defendants are entitled to qualified immunity with respect to Plaintiff's § 1983 claim premised on free speech.

What standard should courts apply in testing whether public institutions' regulations governing student "behavior" overreach into protected speech activities? The Eighth Circuit nearly three decades ago held that university regulations are less susceptible to vagueness or overbreadth challenges than criminal statutes or ordinances. As then-Judge Harry Blackmun explained:

> [T]he regulations are not to be compared with the criminal statute. They are codes of general conduct which those qualified and experienced in the field have characterized not as punishment but as part of the educational process itself and as preferably to be expressed in general rather than specific terms.

Esteban v. Central Missouri State College, 415 F.2d 1077, 1088 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970). The Sixth Circuit has not addressed this issue expressly, but a year before Esteban it affirmed a federal district court's "carefully written" opinion that

> a university must of course maintain order on its campus and exclude therefrom those who are detrimental to its well being. A university has inherent general power to maintain order and to formulate and enforce reasonable rules of student conduct. University regulations for students because of the very nature of the institution and its

> goals and purposes, should not be tested by the same requirements of specificity as are state statutes.

Jones v. State Bd. Of Educ. Of Tenn., 279 F.Supp. 190 (M.D. Tenn. 1968), aff'd, 407 F.2d 834 (6th Cir. 1969);[4] see also Depperman v. University of Ky., 371 F.Supp. 73, 78 (E.D. Ky. 1974)(citing Esteban in finding that "collegiate regulations are not judged by the degree of specificity required for penal statutes"). But see Soglin v. Kauffman, 418 F.2d 163, 167 (7th Cir. 1969)(defining "misconduct" as representing the inherent power of a university to punish its students "would justify the *ad hoc* imposition of discipline without reference to any preexisting standard of conduct").

Courts like the Eighth Circuit thus adhere to a policy

---

[4]In Jones, the U.S. Supreme Court granted certiorari to decide whether Tennessee A & I State University had denied the plaintiff his free speech rights when it punished him for distributing leaflets on campus. The Court dismissed the writ when it discovered the suspension was based at least in part on the fact that plaintiff had lied at his disciplinary hearing. Jones v. State Bd. Of Educ. Of Tenn., 397 U.S. 31, 32 (1970). Justices Douglas and Brennan, who dissented in the Court's decision to dismiss certiorari, distinguished between the campus and the class room for purposes of free speech analysis. The First Amendment, they wrote,

> does not mean that free speech can be used with impunity as an excuse to break up classrooms, to destroy the quiet and decorum of convocations, or to bar the constitutional privileges of others to meet together in matters of common concern. But the campus ... is a fitting place for the dissemination of a wide spectrum of ideas.

Id. at 33-34 (Douglas, J., dissenting). Even a recent article criticizing the Supreme Court's approach to freedom of speech in public schools as too constrictive noted that "the subject matter of speech in the classroom is closely regulated, and rightly so ... ." Elizabeth Wilborn, Teaching the New Three R's — Repression, Rights, and Respect: A Primer of Student Speech Activities, 37 B.C.L.Rev. 119, 154 n.22 (1995).

of "judicial laissez-faire," at least when analyzing university or college regulations of in-class activity. Center for Participant Educ. V. Marshall, 337 F.Supp. 126, 133 (N.D. Fla. 1972). In Bright, the Sixth Circuit stated that school officials' necessary power to maintain order "cannot be accomplished if students are permitted to flout their teachers and disobey lawful orders ... ." Bright, 448 F.2d at 249. Similarly, the Fifth and Fourth circuits applied easily hurdled "reasonableness" standards to student conduct regulations. Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966)(asking whether such regulations "measurably contribute to the maintenance of order and decorum within the educational system"); Sword v. Fox, 446 F.2d 1091, 1097 (4th Cir. 1971) (supplementing Burnside with the question whether such regulations are calculated to prevent "interference with the normal activities of the university or obstruction to its function to impart learning"). See also Sill v. Pennsylvania State Univ., 462 F.2d 463, 467-69 (3d Cir. 1972)(approving regulations barring "disruptive conduct"); Lowrey v. Adams, 344 F.Supp. 446, 453-54 (W.D. Ky. 1972)(upholding regulations stating a university "will not tolerate any disruptive or disorderly conduct"); French v. Bashful, 303 F.Supp. 1333, 1339 (E.D. La. 1969)(upholding regulations requiring "responsible social conduct").

Notably, these and similar rulings were written in the late 1960s and early 1970s during a period of significant student unrest on U.S. campuses. See, e.g., Furumoto v. Lyman, 362 F.Supp. 1267, 1281 (N.D. Cal. 1973)(quoting a 1970 report by a presidential commission stating that "'the last decade clearly shows a gradual movement toward more disruptive, violent, and even terrorist tactics in campus protest'"). Time has rendered these rulings somewhat anachronistic. Judging in a more tranquil environment, several courts within the last decade have struck down speech codes that prohibit racist or demeaning speech on overbreadth and vagueness grounds. See Doe v. University of Mich., 721 F.Supp. 852, 865-67 (E.D. Mich. 1989); see also Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1182 (3d Cir. 1995) (striking down a policy barring "racial and ethnic harassment," which included verbal behavior that "subjects an indi-

vidual to an intimidating, hostile or offensive educational, employment or living environment"); UMW Post, Inc. v. Board of Regents of the Univ. of Wis. Sys., 774 F.Supp. 1163, 1172 (E.D. Wis. 1991)(finding unconstitutional a regulation prohibiting comments or other expressive behavior that "create[d] an intimidating, hostile or demeaning environment for education [or] university-related work"); Corporation of Haverford College v. Reeher, 329 F.Supp. 1196, 1204, 1213-14 (E.D. Pa. 1971)(striking down load eligibility criteria that permitted denying financial assistance to a student convicted of any offense "committed in the course of disturbing, interfering with or preventing ... the orderly conduct of the activities, administration or classes" or disciplined for "contribut[ing] to the disruption" of such campus functions).

Of the modern cases, Doe is the most applicable to Mr. Salehpour's lawsuit. In holding that Michigan administrators had punished protected speech, the district court discussed three incidents, including one in which a professor instituted disciplinary action against a student who commented during class that minorities had a difficult time in the course and were not treated fairly. Doe, 721 F.Supp. at 866. The court found the university's code, which barred stigmatizing or demeaning comments or conduct, to be overbroad, both on its face and as applied, and noted that the school official's "manner of enforcing the Policy was constitutionally indistinguishable from a full blown prosecution. Previous Supreme Court cases "stand generally for the proposition that the state may not prohibit broad classes of speech, some of which may indeed be legitimately regulable, if in so doing a substantial amount of constitutionally protected conduct is also prohibited," the court wrote. Id. at 864.

The Michigan court also found the speech code void on vagueness grounds, noting that "the University never articulated any principled way to distinguish sanctionable from protected speech." Id. at 867. Reeher, an earlier case, similarly found that students were subjected to a heavy penalty based on "the university's interpretation of words without

any guiding standard." Reeher, 329 F.Supp. at 1207. Particularly troubling to the Pennsylvania federal court was the fact that college bureaucrats were making these judgment calls, rather than courts "more sensitive to the niceties of constitutional law." Id. at 1202.

Esteban and Doe thus represent the outer parameters of the debate concerning in-class student speech at institutions of higher education receiving public funds. The events at the center of this case lie somewhere in between. Plaintiff was charged with "misconduct," specifically with:

> 2) Failure to comply with directions of University officials acting in performance of their duties; 6) Obstruction or disruption of teaching, research, administration, disciplinary procedures, or other University activities, including its public service functions or of other authorized activities on University premises; [and] 10) Disorderly conduct or lewd, indecent or obscene conduct or expression on University owned or controlled property or at University sponsored or supervised functions.

(Salehpour Certificate at 40.) Plaintiff also was charged with failing "to maintain the high ethical and professional standards" of the dentistry school, specifically for engaging in a catch-all category that barred any "unprofessional [or] unethical conduct which would bring disrepute and disgrace upon both student and professional and which would tend to substantially reduce or eliminate the student's ability to effectively practice the profession in which discipline he or she is enrolled." (Id. at 40-41).

Significantly, the minutes of the March 1 disciplinary hearing reveal that Dean Lynch's motivation in pursuing academic discipline against Plaintiff was based on what Plaintiff had *written* in his letter to Professor Bowles, not merely Plaintiff's stubborn refusal to change seats and his open challenge of the policy during class time. (Id. at 40.)

Given the vague criteria in UT's ethical/behavior code, it is difficult to imagine how a student could "possibly know what would be a disruption in the opinion of his school" because the word "misconduct" acquires "only such meaning as [the university] may attach to it at any given time." Reeher, 329 F.Supp. at 1207. As the Seventh Circuit explained 28 years ago, the vagueness and overbreadth doctrines require that disciplinary rules be "expressed in reasonably clear and narrow" language. Soglin, 418 F.2d at 167. The charge of "misconduct" at issue in that case was void for vagueness because it "contain[ed] no clues which could assist a student, an administrator or a reviewing judge in determining whether conduct ... is susceptible to punishment by the University as 'misconduct.'" Id. at 168.

At this stage in our jurisprudence, the court need not decide whether UT's regulation is void under the First or Fourteenth amendments. The conflicting caselaw regarding universities' authority to discipline students for in-class speech clearly would immunize the Defendant school officials who pursued disciplinary charges against Mr. Salehpour and found him guilty of violating the school's ethics/conduct code.[5] Even if this court were to determine that Mr. Salehpour had been disciplined under an unconstitutionally vague or overbroad regulation, Defendants' conduct did not violate any "clearly established" doctrine regarding free speech rights of university students of which a reasonable person would have known. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Defendants therefore would be entitled to qualified immunity. In the absence of a genuine factual

---

[5]The court finds absurd Defendants' claim that Plaintiff's speech should not be accorded First Amendment protection because it resulted in a "'substantial disruption of or material interference with school activities.'" (Defs.' Reply Br. At 12)(quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969)). Mr. Salehpour's complaints regarding the back row policy hardly could be described as an "open exhortation to [other] students to engage in disorderly and destructive activities." Norton v. Discipline Comm. of E. Tennessee State Univ., 419 F.2d 195, 198 (6th Cir. 1969), cert. denied, 399 U.S. 906 (1970).

dispute relating to whether Defendants committed acts that allegedly violated clearly established rights, summary judgment is appropriate. Buckner v. Kilgore, 36 F.3d 536, 539 (6th Cir. 1994).

D. Section 1981

Section 1981 forbids discrimination based on race, ethnicity or national origin in the making and enforcement of private and public contracts. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987). This statute covers "only conduct at the initial formation of [a] contract and conduct which impairs the right to enforce contract obligations through legal process." Patterson v. McLean Credit Union, 491 U.S. 164, 179-80 (1989). Plaintiff does not claim that a contractual relationship existed between Mr. Salehpour and the University of Tennessee College of Dentistry, although theoretically selective enforcement of university rules based on race, ethnicity or national origin could violate § 1981. See Albert v. Carovano, 851 F.2d 561, 572 (2d Cir. 1988). Regardless, Plaintiff's § 1981 claim must fail because he has not raised any genuine issue of material fact that would permit a jury to conclude that Defendants' actions were purposefully discriminatory and motivated by Plaintiff's nationality. Albert, 851 F.2d at 571. Plaintiff's purely conclusory allegations, presented in self-generated documents, represent nothing more than his own inferences and suspicions.

IV. TITLE VI

Title VI of the 1964 Civil Rights Act provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994). There is no dispute that the University of Tennessee's College of Dentistry is a "program or activity receiving Federal financial assistance," so the court will turn to the merits of Plaintiff's claim.

To avoid summary judgment in a Title VI lawsuit,

Plaintiff must demonstrate a genuine issue of material fact that the defendant intended to discriminate on the basis of race, color or national origin. Buchanan v. City of Bolivar, 99 F.3d 1352, 1356 (6th Cir. 1996). This requires Plaintiff to demonstrate that Defendants' decision to pursue disciplinary charges against him was motivated by the fact that he is Iranian and that his national origin "was a determining factor" in their action. Id. It follows that if Defendants were motivated by a factor other than Plaintiff's national origin, there can be no intentional discrimination, and a Title VI action cannot lie. Id. (citing Hazen Paper Co. V. Biggins, 507 U.S. 604, 609 (1993)).

To survive Defendants' summary judgment motion, Plaintiff must introduce more than mere allegations and conclusions that national origin discrimination was at the heart of the decision to bring charges against him or to reprimand him. Id. at 1357. Mr. Salehpour has not met this burden. See discussion supra Part IV.B. This is consistent with this court's decision regarding Plaintiff's equal protection claim. See Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 610-11 (1983)(holding that Title VI is coextensive with the guarantees of the Fourteenth Amendment).[6]

V. AMERICANS WITH DISABILITIES ACT/SECTION 504

Courts have ruled that the 1990 Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* (1994), is to be interpreted consistent with § 504 of the 1973 Rehabilitation Act. See Maddox v. University of Tennessee, 62 F.2d 843, 846 n.2 (6th Cir. 1995)(stating that the ADA "parallels the protections of the Rehabilitation Act"). To establish a prima facie

---

[6]This same rationale defeats any claim Plaintiff attempts to raise under 42 U.S.C. § 1985(3), which makes it a federal tort for a private group to conspire "for the purpose of depriving ... any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... ." 42 U.S.C. § 1985(3) (1994). Claims brought under this statute require proof that the defendant's conduct was motivated by racial or class- or ethnicity-based animus. Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).

case under § 504 of the Rehabilitation Act, Plaintiff must allege and prove that (1) he is a "disabled person" within the meaning of the statute; (2) he is "otherwise qualified" to participate in UT's dentistry program; (3) the institution receives federal financial assistance; and (4) he was denied the benefits in or excluded from participation in UT activities "solely by reason" of his disability. Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979); Doherty v. Southern College of Optometry, 862 F.2d 570, 573 (6th Cir. 1988), cert. denied, 493 U.S. 810 (1989).

No document filed with this court indicates that any Defendant or other UT official or employee knew or had reason to suspect Plaintiff was suffering from any condition that could qualify as a disability under federal law. To be liable under the Rehabilitation Act, a school or university must have known or reasonably should have known of the plaintiff's disability. Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1185 (6th Cir. 1996). Having failed to put the dental school on notice of his alleged disability, for example by requesting an accommodation, Plaintiff cannot maintain an action under either the ADA or § 504.

In addition, even if he were able to demonstrate that UT's faculty or administration knew or should have known of his condition, Plaintiff has come forward with no affirmative evidence to create a material dispute that the disciplinary action taken against him was "solely by reason" of his condition. The Sixth Circuit addressed this issue last year when it rejected another circuit's interpretation that a plaintiff can create a genuine issue of material fact that he was discriminated against "solely by reason" of his disability if he can show that the action taken against him was "causally related" to his disability. Maddox, 62 F.3d at 846-47 (criticizing the Second Circuit's approach in Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511 (2d Cir. 1991)). In Teahan, an employee had claimed that his excessive absenteeism was the result of his alcoholism and therefore protected under the Rehabilitation Act. The Second Circuit disagreed with the lower court's distinction between misconduct and the disabling condition that may have led to that misconduct, pre-

suming that the employee's absenteeism resulted from his alcoholism, at least for summary judgment purposes. Id. at 515-17.

The Sixth Circuit, however, distinguished between discharging an employee for unacceptable misconduct and discharging that person because of his or her disability. Maddox, 62 F.3d at 847. Referring to the situation of an alcoholic employee, the appeals court said that "to hold otherwise, an employer would be forced to accommodate all behavior of an alcoholic which could in any way be related to the alcoholic's use of intoxicating beverages ... ." Id.. Several other circuits have maintained this conduct/disability distinction. See Taub v. Frank, 957 F.2d 8, 11 (1st Cir. 1992); Little v. F.B.I., 1 F.3d 255, 259 (4th Cir. 1993).

The written communications among UT's faculty, the administration and Mr. Salehpour unequivocally reflect a concern that Plaintiff had behaved in a disruptive and unethical manner. Regardless of the constitutionality of the regulations under which Plaintiff was disciplined, there is no evidence that any member of the Academic Status Committee, Dean Lynch, Director Bowles, Professor Fletcher or any other named defendant "interposed plaintiff's handicap" as a reason for taking disciplinary action. See Cortes v. Northeastern Illinois Univ., 1990 WL 186425 at *9 (N.D. Ill., Nov. 14, 1990); see also Davis, 442 U.S. at 405 (Section 504 indicates "only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.").[7]

VI. STATE LAW CLAIMS

---

[7]Although there is a slightly broader definition of "disability" under the ADA, the analysis is the same. To establish an ADA violation, Plaintiff must show that he was subjected to unlawful treatment "because of" his disability. 42 U.S.C. § 12112. As the above analysis demonstrates, summary judgment is appropriate because the evidence does not create a genuine issue of material fact on the issue.

The remainder of Plaintiff's claims, which arise under Tennessee law, are before this court pursuant to the doctrine of pendent jurisdiction. 42 U.S.C. § 1367 (1994). The Sixth Circuit has held that when federal issues are dismissed before trial, the district court should decline to exercise jurisdiction over pendant state law claims. Musson Theatrical, Inc. v. Federal Express Corp., 89 F.3d 1244, 1254-55 (6th Cir. 1996) (citing United Mine Workers v. Gibbs, 383 U.S. 715 (1966)). Accordingly, the court will not exercise pendant jurisdiction over Plaintiff's claims for intentional and negligent infliction of emotional distress (Counts IV & V).

VII. ADDITIONAL TIME/PERMISSION TO AMEND

Plaintiff at several points in his memorandum opposing Defendants' motion "moves" the court under Rule 56(f) for additional time to conduct discovery. (See, e.g., Pl.'s Mem. Opp'n Mot. For Summ. J. at 9.) Plaintiff also asks the court for permission to amend the Complaint in the event the court determined Plaintiff had not met his pleading burden under Rule 8. (Id. at 10 n.4, 11 n.15.) Both these requests are denied.

Rule 56(f) provides the mechanism by which a court may defer summary judgment to allow the nonmoving party time to ready a proper response. The rule clearly states that the nonmovant must file an *affidavit* showing that the party "cannot for reasons stated present ... facts essential to justify the party's opposition." Fed. R. Civ. P. 56(f); Plott v. General Motors Corp., Packard Elec. Div., 71 F.3d 1190, 1196 (6th Cir. 1995), cert. denied, 116 S.Ct. 1546 (1996). Plaintiff has failed to comply with the Federal Rules, but asks the court for extra time.

In Klepper v. First Am. Bank, 916 F.2d 337 (6th Cir. 1990), the appeals court cited the Federal Rules' requirement that the nonmoving party has "the burden of showing, by affidavit, why he was not able to oppose the motion for summary judgment," id. at 343, and the Sixth Circuit routinely sustains district courts' decisions to grant summary judgment motions where the nonmoving party has not supplied the

appropriate affidavit under Rule 56(f). See id.; Shavrnoch v. Clark Oil and Refining Corp., 726 F.2d 291, 294 (6th Cir. 1984). Subsequent rulings appear to have relaxed the method by which a party may request more time for discovery, however. The Sixth Circuit recently stated that it would review whether a nonmoving party was given adequate time for discovery only if the party filed "either a Rule 56(f) affidavit *or a motion* that gives the district court a chance to rule on the need for additional discovery." Plott, 71 F.3d at 1196 (emphasis added). But this court does not believe the alternative to an affidavit mentioned in Plott includes dropping a footnote in a memorandum, as Plaintiff did. At a minimum, a separate motion is required.

Even if Plaintiff had followed the proper procedure, this court would deny the motion. Plaintiff's copious filings with this court demonstrate he has had ample time to uncover "information essential to opposition." See Elvis Presley Enter., Inc. v. Elvisly Yours, Inc., 936 F.2d 889, 893 (6th Cir. 1991).

Although Rule 15(a) of the federal rules provides that leave to amend a pleading "shall be freely given where justice so requires," it does not require the court to indulge futile requests to amend. DeLoach v. Woodley, 405 F.2d 496, 496-97 (6th Cir. 1968). Courts need not allow amendments under Rule 15(a) if the amended pleading could be defeated on a motion for summary judgment or a motion to dismiss. Kenty v. Bank One, Columbus, N.A., 1993 WL 592532, at *6 (S.D. Ohio Oct. 25, 1993), aff'd, 92 F.3d 384 (6th Cir. 1996). In this case, amending Plaintiff's complaint would be pointless because any correction of defective pleadings would not alter the court's reasoning in granting Defendants' motion under Rule 56(c).

VIII. ORDER

Based on the foregoing analysis, this court **GRANTS** Defendants' motion for summary judgment with respect to Plaintiff's federal law claims and **DISMISSES WITHOUT PREJUDICE** Plaintiff's state law claims.

IT IS SO ORDERED this 10th of March, 1997.

/s/
BERNICE BOUIE DONALD
UNITED STATES DISTRICT
COURT JUDGE

APPENDIX D -- COMPLAINT FILED FEBRUARY 14, 1996

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

SAMAD SALEHPOUR,

Plaintiff,

vs. NO. 96-2217 D

JURY DEMANDED

UNIVERSITY OF TENNESSEE; JOSEPH E. JOHNSON, in his official capacity as President of the University of Tennessee and in his individual capacity; WILLIAM R. RICE, in his official capacity as Chancellor of the University of Tennessee and in his individual capacity; WILLIAM F. SLAGLE, in his official capacity as Dean of the University of Tennessee College of Dentistry and in his individual capacity; WILLIAM F. BOWLES, III, in his individual capacity; VICTOR A FLETCHER, in his individual capacity; DENIS P. LYNCH, in his individual capacity; JOE M. GOSS, in his individual capacity; MARK R. PATTERS, in his individual capacity; MORRIS L. ROBBINS, in his individual capacity; JIMMY E. ALBRIGHT, in his individual capacity; HARRY K. SHARP, in his individual capacity; ROLF G. BEHRENTS, in his individual capacity; RUSSELL GILPATRIC, in his individual capacity; HARRY H. MINCER, in his individual capac-

ity; BEN R. HIPP, in his individual capacity; MARJORIE A. WOODS, in her individual capacity; CHARLES SMITH, in his individual capacity; ROBERT G. KEIM, in his individual capacity; VAN T. HIMEL, in his individual capacity; and BETTIE T. PUCKETT, in her official capacity as Director of Affirmative Action and in her individual capacity,

Defendants.

COMPLAINT

COMES NOW the Plaintiff, Samad Salehpour, and for cause of action against the Defendants would state as follows:

PARTIES

1. Plaintiff, Samad Salehpour, is a citizen of the United States and a resident citizen of Memphis, Shelby County, Tennessee.

2. Defendant, University of Tennessee, is a legal entity created by the State of Tennessee, i.e. T.C.A. §49-9-101 et seq, operating a post-secondary educational university system throughout the State of Tennessee.

3. Defendant, Joseph E. Johnson, is the President of the University of Tennessee and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

4. Defendant, William R. Rice, is the Chancellor of the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

5. Defendant, William F. Bowles, III, is the Chair of the Department of Prosthondontics and a Professor in the

Department of Prosthondontics and a member of the Academic Status Committee at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

6. Defendant, Victor A. Fletcher, is an Associate Professor in the Department of Prosthondontics at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

7. Defendant, Denis P. Lynch, is the Associate Dean of the College of Dentistry and a Professor in the Department of Prosthondontics at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

8. Defendant, Joe M. Goss, is an Associate Professor in the Department of Prosthondontics at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

9. Defendant, Mark R. Patters, is the Chair of the Department of Periodontology, a Professor in the Department of Periodontology and a member of the Academic Status Committee at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

10. Defendant, William F. Slagle, is the Dean of the College of Dentistry at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

11. Defendant, Morris L. Robbins, is the Associate Dean for Clinical Affairs, a Professor in the Department of Clinical Affairs and a member of the Academics Status Committee at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

12. Defendant, Jimmy E. Albright, is the Chair of the Department of Oral and Maxiofacial Surgery, a Professor in the Department of Oral and Maxiofacial Surgery and a member of the Academic Status Committee at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

13. Defendant, Harry K. Sharp, is a Professor of Pediatric Dentistry and a member of the Academic Status Committee at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

14. Defendant, Rolf G. Behrents, is the Chair of Orthodontics in the College of Dentistry, a Professor in the Department of Orthodontics and a member of the Academic Status Committee at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

15. Defendant, Russell Gilpatric, is the Chair of General Dentistry in the College of Dentistry, a Professor in the Department of General Dentistry and a member of the Academic Status Committee at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

16. Defendant, Harry H. Mincer, is an Associate Professor of Pathology and a member of the Academic Status Committee at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

17. Defendant, Benn R. Hipp, is a Professor of Oral and Maxofacial Surgery in the College of Dentistry and a member of the Ad Hoc Appeals Committee at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

18. Defendant, Marjorie A. Woods, is an Associate Professor of Biologic and Diagnostic Sciences and a member of the Ad Hoc Appeals Committee at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

19. Defendant, Charles Smith, is an Associate Professor of Prosthondontics in the College of Dentistry and a member of the Ad Hoc Appeals Committee at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

20. Defendant, Robert G. Keim, is an Associate Professor of Orthodontics in the College of Dentistry and a mem-

ber of the Ad Hoc Appeals Committee at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

21. Defendant, Van T. Himel, is a Professor of General Dentistry in the College of Dentistry and a member of the Ad Hoc Appeals Committee at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

22. Defendant Bettie T. Puckett, is the Director of the Affirmative Action Office at the University of Tennessee, Memphis, and at all times relevant herein was acting under color of law, regulation, policy and/or custom.

JURISDICTION AND VENUE

23. This Court has jurisdiction over the claims brought in this lawsuit pursuant to 28 U.S.C. §1331, 28 U.S.C. §1343 (3) and 28 U.S.C. §1367. Plaintiff's claims are brought pursuant to 28 U.S.C. §§2201-2202, 42 U.S.C. §1981, 42 U.S.C. §1983, 42 U.S.C. §2000d et seq., 42 U.S.C. §12131 et seq., 29 U.S.C. §794, and the laws of the State of Tennessee.

24. Venue is proper in this Court pursuant to 28 U.S.C. §1391(b).

FACTS

25. Plaintiff was born in the sovereign nation of Iran. He has resided in the United States since 1973. He obtained his United States citizenship in 1979.

26. Plaintiff was admitted to the University of Tennessee College of Dentistry in Memphis, Tennessee, as a first year dental student on August 12, 1994.

27. The University of Tennessee employs greater than fifteen (15) employees and is a recipient of federal funds.

28. Plaintiff is a qualified individual with a disability as a result of previous life-threatening situations and serious injuries. He suffers from numbness and pain in his neck, arm and back and severe headaches; nervousness and distraction if another person(s) is in close proximity to him especially behind him; and difficulty hearing well, i.e. word recogni-

tion/discrimination, when background noise increases.

29. Because of his disability, Plaintiff chose to sit in the back row of his classes in order to reduce his pain and suffering, allow him to see and hear to the best of his ability and to afford him maximum concentration without distraction and fear in order to utilize his learning abilities to their full extent.

30. Defendants Bowles and Fletcher mocked, harassed, humiliated and forced Plaintiff to leave classes because of his decision to sit in the back row. Plaintiff's fellow students were encouraged to mock and harass Plaintiff because he chose to sit in the back row of his classes.

31. A caucasian student who sat in the back row was not required to move to another seat until Plaintiff also sat in the back row.

32. Plaintiff was disciplined for "misconduct and unethical and unprofessional behavior" because of his need to sit in the back row and for his opposition to rules, including the back row seating rule.

33. The policies, procedures, rules and regulations of Defendant University of Tennessee were applied differently to Plaintiff by the individually-named Defendants because of his national origin, i.e. Iranian, including, but not limited to, discipline, dress code, and grading. Said application was sanctioned by the University of Tennessee.

34. Plaintiff has had to employ legal counsel to pursue his claims herein.

COUNT I
42 U.S.C. §1981
42 U.S.C. §2000d

35. Plaintiff incorporates paragraphs one (1) through thirty-four (34) of this Complaint into this Count I as though set out verbatim herein.

36. Because of Plaintiff's Iranian ethnicity, he has a dark complexion and speaks with an accent.

37. Defendant University of Tennessee's policies, procedures, rules and regulations, including, but not limited to, discipline, dress code, response to inquiries and grading,

were applied differently to Plaintiff by the individually-named Defendants because of his national origin, i.e. Iranian.

38. Plaintiff was characterized as terrorizing Defendant Bowles; such characterization being stereotypical of a person of Mid-Eastern and/or Iranian ethnicity.

39. Defendant Woods characterized Plaintiff's alleged misconduct as cultural stating, "he doesn't understand the American way to do things, how to work things out with people, about how to be truthful." This statement was intentionally and derogatorily addressed to Plaintiff's ethnicity.

40. Defendant Bowles imposed a dress code in his classroom which was strictly enforced against Plaintiff, but not strictly enforced against caucasian students.

41. Plaintiff filed a complaint for ethnic discrimination and retaliation with Defendant Bettie T. Puckett who failed to conduct a proper investigation and found that Plaintiff's complaint was without merit.

42. Defendants retaliated against Plaintiff for opposing the discriminatory rules and for filing his complaints with the Affirmative Action Office.

43. The conduct of Defendants was intentional, malicious, done with reckless disregard and in deliberate indifference to the rights of Plaintiff guaranteed to him by federal law.

44. As a result of the discriminatory conduct of the Defendants, Plaintiff was denied the benefits, privileges, terms, and conditions of his contractual relationship with Defendant University of Tennessee.

45. As a result of the conduct of the Defendants described herein, Plaintiff has suffered, and will continue to suffer, lost wages, loss of earning capacity, emotional pain and suffering, humiliation and embarrassment, and loss of enjoyment of life.

COUNT II
42 U.S.C. §1983

46. Plaintiff incorporates paragraphs one (1) through forty-five (45) of this Complaint into this Count II as though

set out verbatim herein.

47. Defendant University of Tennessee provides the following two alternative judicial procedures which are available to its students charged with misconduct which may result in discipline:

a. Defendant University of Tennessee, with the assistance and advice of students and other members of the University community, has developed procedures which provide a student with written notice of the substance of the charges brought, the disciplinary action taken or proposed, his right to a hearing, where to request the hearing, the time limitation for requesting a hearing, his right to legal counsel, and his right to a hearing pursuant to the Tennessee Uniform Administrative Procedures Act. At a hearing held under this procedure, the student has the right to question opposing witnesses.

b. A hearing conducted pursuant to the contested cases section of the Uniform Administrative Procedures Act (T.C.A. §4-5-108 et seq.).

48. Plaintiff never received the requisite notice provided in Defendant University of Tennessee's judicial procedures.

49. By letter dated February 16, 1995, Defendant Lynch advised Plaintiff that "your actions represent misconduct and unethical and unprofessional behavior." Additionally, Defendant Lynch advised Plaintiff that he was requesting Defendant Robbins to convene the Academic Status Committee "to review your behavior and, if appropriate, impose appropriate disciplinary sanctions."

50. By letter dated February 21, 1995, Defendant Robbins notified Plaintiff that a meeting of the Academic Status Committee was set for March 1, 1995, that after the Committee had discussed the case against Plaintiff, he would be "called for comments and questions by the committee."

51. By letter dated February 22, 1995, to Defendant Robbins, Plaintiff requested the March 1, 1995, meeting be postponed until after completion of his block exams. Plaintiff also requested "written documentation of the substance/details of the charges in accordance with the university policy" and questioned why he would not be allowed to be pre-

sent during the time when opposing statements were being made about him. Defendant Robbins never responded to Plaintiff's request, the meeting was not postponed, and Defendant Robbins did not comply with the university policy as requested by Plaintiff.

52. As set out in the Academic Status Committee Policy Governing Student Standing, the "Academic Status Committee is charged by the Dean of the College of Dentistry with monitoring student progress and making recommendations on student standing with emphasis on those students experiencing academic difficulty." The Academic Status Committee is not charged with, nor does it have authority to, impose discipline on a student without complying with the judicial procedures set forth in paragraph forty-six (46).

53. On March 1, 1995, the Academic Status Committee comprised, in part, of Defendants Robbins, Patters, Sharp, Albright, Behrents, Bowles, Mincer and Gilpatrick, met, heard statements about Plaintiff in his absence from Defendants Lynch and Bowles. Following these statements, Defendants Lynch and Bowles left the meeting and Plaintiff was permitted to make a statement. Following Plaintiff's statements, he was told to leave the meeting and Defendants Lynch and Bowles returned to the meeting. Following discussion, the Committee approved the following disciplinary action against Plaintiff: "Mr. Sam Salehpour is guilty of misconduct, unprofessional and unethical behavior. The student is to be sent a letter of severe reprimand which will be added to his academic record. He is required to apologize to the instructors, Dr. Bowles, Dr. Goss, Dr. Fletcher and Dr. Dean, and to his classmates for disrupting educational experiences. This apology will be done in a timely manner. The student will be placed on disciplinary probation and warned he will be dismissed if he is found guilty of other academic infractions. This probation will be for the entirety of his matriculation in this college."

54. On April 18, 1995, the Ad Hoc Appeals Committee comprised of Defendants Himel, Keim, Hipp, Woods and Smith convened a meeting to hear Plaintiff's appeal of the imposed discipline. Statements were heard from Defendant Lynch about Plaintiff in Plaintiff's absence. Defendant

Lynch then left the meeting. Plaintiff was permitted to make a statement and then told to leave the meeting. Statements were then taken from Defendants Lynch and Himel. Following discussion, the discipline imposed by the Defendant members of the Academic Status Committee was upheld with modifications. In addition, the Ad Hoc Appeals Committee denied Plaintiff's request to retake his block exams which he failed because they were scheduled during the same time period as the Academic Status Committee meeting.

55. Defendants Slagle, Rice and Johnson upheld the decisions of the Academic Status Committee and the Ad Hoc Appeals Committee.

56. The Defendant members of the Academic Status Committee and the Ad Hoc Appeals Committee and Defendants Slagle, Rice and Johnson knew, or should have known, that they lacked authority to impose discipline without complying the the judicial procedures of Defendant University of Tennessee.

57. Defendants intentionally deprived Plaintiff of due process and equal protection of the laws as guaranteed to him by the Fourteenth Amendment to the United States Constitution. Defendants were deliberately indifferent to these guaranteed rights of Plaintiff.

58. Defendant University of Tennessee has a policy which states: "It is the right and responsibility of the individual student or groups of students to be interested in and to question the policies, regulations, and procedures affecting them." When Plaintiff attempted to invoke his rights under this policy, he was harassed, intimidated and disciplined. Defendants denied Plaintiff his right to expression delineated in this policy and his right to free speech guaranteed to him by the First Amendment of the United States Constitution.

59. Defendant University of Tennessee's policy with regard to affirmative action complaints includes confidentiality of the complainant. Defendant Puckett, in violation of this policy, disclosed the contents of Plaintiff's name and content of his complaints in violation of this policy and in violation of Plaintiff right to privacy guaranteed to him by the First Amendment to the United States Constitution.

60. The individually-named Defendants conspired to deny Plaintiff his constitutionally-guaranteed rights in an attempt to assure Plaintiff's failure at the College of Dentistry. These Defendants were privy to the communications among Plaintiff, Defendants Lynch, Bowles, Fletcher and Robbins and information regarding Plaintiff's disability; they knew Plaintiff had not been given the requisite notice pursuant to the University's judicial procedures; they knew, and agreed not to follow, the University's judicial procedures; they knew they did not have authority to impose the discipline against Plaintiff, but agreed to do so anyway; and they agreed that the discipline imposed would result in Plaintiff being forced out of the College of Dentistry without graduating. The conduct of these Defendants in formulating and carrying out this conspiracy resulted in the denial of Plaintiff's rights as guaranteed to him by the First and Fourteenth Amendments to the United States Constitution.

61. The conduct of the Defendants described herein was intentional, malicious, done with reckless disregard and with deliberate indifference to Plaintiff's rights guaranteed to him by the First and Fourteenth Amendments to the United States Constitution.

62. As a result of the conduct of the Defendants described herein, Plaintiff has suffered, and will continue to suffer, lost wages, loss of earning capacity, emotional pain and suffering, humiliation and embarrassment, and loss of enjoyment of life.

COUNT III
42 U.S.C. §12131 et seq.
29 U.S.C. §794

63. Plaintiff incorporates paragraphs one (1) through sixty-two (62) into this Count III as though set out verbatim herein.

64. Defendants Bowles and Fletcher impose a rule applicable in their classrooms which bars sitting in the back row. This rule has a negative impact only on disabled students by removing accessibility of facilities creating unnecessary segregation of disabled persons. This rule is sanctioned

by Defendant University of Tennessee, its College of Dentistry and the individually-named Defendants.

65. Defendants Bowles and Fletcher impose a rule applicable in his classroom which bars students from obtaining a copy of the material used in slide and view graph presentations. This rule has a negative impact only on disabled students. This rule is sanctioned by Defendant University of Tennessee, its College of Dentistry and the individually-named Defendants.

66. Defendant Bowles imposes a dress code applicable in his classroom. This dress code has a negative impact only on disabled students. This rule is sanctioned by Defendant University of Tennessee, its College of Dentistry and the individually-named Defendants.

67. Defendant Bowles has a practice of holding students over in his classes during scheduled breaks between classes. This practice has a negative impact on disabled students. This rule is sanctioned by Defendant University of Tennessee, its College of Dentistry and the individually-named Defendants.

68. Defendants Fletcher and Goss impose a rule disallowing student from tape recording their lectures. This rule has a negative impact on disabled students. This rule is sanctioned by Defendant University of Tennessee, its College of Dentistry and the individually-named Defendants.

69. Plaintiff was discriminated against because of his disability by the imposition of the rules and the dress code set out in paragraphs sixty-four (64) through sixty-eight (68). These rules and dress code had the effect of limiting Plaintiff's participation in the educational programs of Defendant University of Tennessee's College of Dentistry.

70. When Plaintiff sat in the back row, he was given the option by Defendants Bowles and Fletcher to either move to the front row of the classroom, move forward or leave the classroom.

71. Defendants Bowles and Fletcher harassed and ridiculed Plaintiff in front of his classmates because of his need to sit in the back row; Defendants Bowles and Fletcher encouraged Plaintiff's classmates to harass and ridicule Plaintiff because of his objections to the discriminatory rules.

72. Defendants Bowles' and Fletcher's actions against Plaintiff were sanctioned and supported by the remaining Defendants and Plaintiff was disciplined as a result of and in retaliation for his actions opposing the discriminatory rules.

73. The conduct of the Defendants against Plaintiff after he voiced his objection to the rules and the dress code were in retaliation for Plaintiff's opposition.

74. The conduct of the Defendants described herein was intentional, malicious, in reckless disregard of, done with deliberate indifference to, and was in violation of Plaintiff's rights guaranteed to him under the Americans With Disabilities Act and the Rehabilitation Act.

75. As a result of the conduct of the Defendants described herein, Plaintiff has suffered, and will continue to suffer, lost wages, loss of earning capacity, pain and suffering, both physical and emotional, humiliation and embarrassment, and loss of enjoyment of life.

COUNT IV
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (INDIVIDUALLY-NAMED DEFENDANTS ONLY)

76. Plaintiff incorporates paragraphs one (1) through seventy-five (75) of this Complaint into this Count IV as though set out verbatim herein.

77. The conduct of the individually-named Defendants was done intentionally, maliciously and with reckless disregard to the rights of the Plaintiff.

78. As a result of the conduct of the individually-named Defendants described herein, Plaintiff has suffered, and will continue to suffer, lost wages, loss of earning capacity, pain and suffering, both physical and emotional, humiliation and embarrassment, and loss of enjoyment of life.

79. The conduct of the individually-named Defendants was the direct and proximate result of the injuries suffered by Plaintiff.

COUNT V
NEGLIGENT INFLICTION

OF EMOTIONAL DISTRESS
(INDIVIDUALLY-NAMED DEFENDANTS ONLY)

80. Plaintiff incorporates paragraphs one (1) through seventy-nine (79) of this Complaint into this Count V as though set out verbatim herein.

81. The conduct of the individually-named Defendants was done negligently with total disregard of the rights of Plaintiff.

82. As a result of the conduct of the individually-named Defendants described herein, Plaintiff has suffered, and will continue to suffer, lost wages, loss of earning capacity, pain and suffering, both physical and emotional, humiliation and embarrassment, and loss of enjoyment of life.

83. The conduct of the individually-named Defendants was the direct and proximate result of the injuries suffered by Plaintiff.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays for the judgment against the Defendants as follows:

1. A declaration that rights guaranteed to the Plaintiff by the First (Freedom of Speech/Right to Privacy) and Fourteenth (Equal Protection and Due Process) Amendments to the United States Constitution have been violated.

2. A declaration that the rights afforded Plaintiff pursuant to 42 U.S.C. §1981, 42 U.S.C. §1983, 42 U.S.C. §2000d et seq., 42 U.S.C. §12131 et seq. and 29 U.S.C. §794 have been violated.

3. That Defendants be ordered to bring the University of Tennessee in compliance with 42 U.S.C. §1981, 42 U.S.C. §1983, 42 U.S.C. §2000d et seq., 42 U.S.C. §12131 et seq. and 29 U.S.C. §794.

4. That Defendants be ordered not to discriminate and/or retaliate against Plaintiff following his reinstatement.

5. Reinstatement to the University of Tennessee College of Dentistry.

6. That Plaintiff be provided with due process and equal protection in accordance with the written policies and procedures of the University of Tennessee College of Dentistry in the event such due process is necessary following

Plaintiff's reinstatement.

7. Removal from Plaintiff's records all documents pertaining to the alleged misconduct and discipline imposed prior to the filing of this Complaint.

8. Actual and compensatory damages, jointly and severly, in an amount not to exceed Seven Hundred Fifty Thousand Dollars ($750,000.00).

9. Punitive damages against the individually-named Defendants, jointly and severly, in an amount not to exceed One Million Dollars ($1,000,000.00).

10. Attorney fees, expenses, and costs.

11. For any further and other relief to which Plaintiff may be entitled.

JURY DEMAND

Plaintiff demands a trial by jury for all issues so triable.

Respectfully Submitted,

KIRKPATRICK, MOORE & WESTBROOK

/s/

Connie Westbrook #13997
100 North Main Building
Suite #2900
Memphis, Tennessee 38103
(901) 523-2161

APPENDIX E -- MOTION TO DISMISS OR OR SUMMARY JUDGMENT FILED APRIL 15, 1996

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

SAMAD SALEHPOUR,

Plaintiff,

vs. NO. 96 2217 DV

UNIVERSITY OF TENNESSEE; JOSEPH E. JOHNSON, in his official capacity as President of the University of Tennessee and in his individual capacity; WILLIAM R. RICE, in his official capacity as Chancellor of the University of Tennessee and in his individual capacity; WILLIAM F. SLAGLE, in his official capacity as Dean of the University of Tennessee College of Dentistry and in his individual capacity; WILLIAM F. BOWLES, III, in his individual capacity; VICTOR A FLETCHER, in his individual capacity; DENIS P. LYNCH, in his individual capacity; JOE M. GOSS, in his individual capacity; MARK R. PATTERS, in his individual capacity; MORRIS L. ROBBINS, in his individual capacity; JIMMY E. ALBRIGHT, in his individual capacity; HARRY K. SHARP, in his individual capacity; ROLF G. BEHRENTS, in his individual capacity;

RUSSELL GILPATRIC, in his individual capacity; HARRY H. MINCER, in his individual capacity; BEN R. HIPP, in his individual capacity; MARJORIE A. WOODS, in her individual capacity; CHARLES SMITH, in his individual capacity; ROBERT G. KEIM, in his individual capacity; VAN T. HIMEL, in his individual capacity; and BETTIE T. PUCKETT, in her official capacity as Director of Affirmative Action and in her individual capacity,

Defendants.

DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, defendants move the court to dismiss this action on the following grounds:

1. The court lacks subject matter jurisdiction over plaintiff's claims against The University of Tennessee and University officials in their official capacities under 42 U.S.C. §§ 1981 and 1983 and under state law.

2. The complaint fails to state a claim of national origin discrimination under Title VI and § 1981.

3. The complaint fails to state a claim of disability discrimination under Title II of the Americans with Disabilities Act and § 504 of Rehabilitation Act.

4. The complaint fails to state a claim against the University officials in their individual capacities under Title VI, the ADA, or the Rehabilitation Act.

5. The complaint fails to state a claim against the University officials in their individual capacities under 42 U.S.C. § 1983 because:

a. Defendants Johnson and Rice had no personal involvement in any violation of plaintiff's rights.

b. Plaintiff suffered no deprivation of a constitutionally protected property or liberty interest.

c. Plaintiff received adequate procedural due process.

d. Plaintiff suffered no retaliation for the exercise of free speech rights.

e. Defendants are entitled to qualified immunity because they did not violate any clearly established right of due process or free speech.

f. The intra-corporate conspiracy doctrine bars plaintiff's claim of conspiracy.

6. The complaint fails to state a claim against the University officials in their individual capacities under state law because they have absolute immunity under Tenn. Code Ann. § 9-8-307(h).

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendants Johnson and Rice move in the alternative for summary judgment in their favor on the ground that there is no genuine issue of material fact with respect to their liability, and they are entitled to judgment as a matter of law. In support of their motion for summary judgment, defendants Johnson and Rice rely on their affidavits attached as Exhibits 1 and 2 to this motion.

Respectfully Submitted,

Beauchamp E. Brogan
General Counsel
The University of Tennessee

BY: /s/
Odell Horton, Jr.
Associate General Counsel
847 Monroe Avenue
Suite 241
Memphis, Tennessee 38163
(901) 448-5615

CERTIFICATE OF SERVICE

I certify that I have mailed a copy of the foregoing Defendants' Motion to Dismiss or for Summary Judgment to Connie Westbrook, Esq., plaintiff's counsel, by first class mail this 15th day of April, 1996.

/s/
Attorney

APPENDIX F -- DEFENDANTS' MEMORANDUM OF LAW FILED APRIL 15, 1996

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

SAMAD SALEHPOUR,

Plaintiff,

vs.

NO. 96 2217 DV

UNIVERSITY OF TENNESSEE; JOSEPH E. JOHNSON, in his official capacity as President of the University of Tennessee and in his individual capacity; WILLIAM R. RICE, in his official capacity as Chancellor of the University of Tennessee and in his individual capacity; WILLIAM F. SLAGLE, in his official capacity as Dean of the University of Tennessee College of Dentistry and in his individual capacity; WILLIAM F. BOWLES, III, in his individual capacity; VICTOR A FLETCHER, in his individual capacity; DENIS P. LYNCH, in his individual capacity; JOE M. GOSS, in his individual capacity; MARK R. PATTERS, in his individual capacity; MORRIS L. ROBBINS, in his individual capacity; JIMMY E. ALBRIGHT, in his individual capacity; HARRY K. SHARP, in his individual capacity; ROLF G. BEHRENTS, in his individual capacity;

RUSSELL GILPATRIC, in his individual capacity; HARRY H. MINCER, in his individual capacity; BEN R. HIPP, in his individual capacity; MARJORIE A. WOODS, in her individual capacity; CHARLES SMITH, in his individual capacity; ROBERT G. KEIM, in his individual capacity; VAN T. HIMEL, in his individual capacity; and BETTIE T. PUCKETT, in her official capacity as Director of Affirmative Action and in her individual capacity,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

STATEMENT OF THE CASE

The complaint in this action purports to state the following claims: national origin discrimination under 42 U.S.C. § 1981 and Title VI of the Civil Rights Acts of 1964, 42 U.S.C. § 2000d; disability discrimination under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*; denial of due process, equal protection, and First Amendment rights under 42 U.S.C. § 1983; and supplemental state law claims of intentional and negligent infliction of emotional distress.

Plaintiff is a former student in the College of Dentistry at The University of Tennessee, Memphis. Plaintiff withdrew from the College of Dentistry on May 8, 1995. (Affidavit of Rice ¶ 5). This action arises out of plaintiff's violation of a classroom rule against sitting on the back row and the resulting decision to place a letter of reprimand in plaintiff's academic

file and place him on probation for the remainder of his enrollment in the College of Dentistry. (Complaint ¶ 53). Defendants are The University of Tennessee and twenty University officials, all of whom are sued in their individual capacities and four of whom are also sued in their official capacities (President Johnson, Chancellor Rice, Dean Slagle, and Ms. Puckett, Director of Affirmative Affairs). The only involvement of President Johnson and Chancellor Rice in any matter alleged in the complaint was to rule on plaintiff's voluntary and discretionary appeals to them. (Affidavits of Johnson & Rice.)

The University has moved for dismissal of the complaint on the following grounds:

1. The court lacks subject matter jurisdiction over plaintiff's claims against The University of Tennessee and University officials in their official capacities under 42 U.S.C. §§ 1981 and 1983 and under state law.

2. The complaint fails to state a claim of national origin discrimination under Title VI and § 1981.

3. The complaint fails to state a claim of disability discrimination under Title II of the Americans with Disabilities Act and § 504 of Rehabilitation Act.

4. The complaint fails to state a claim against the University officials in their individual capacities under Title VI, the ADA, or the Rehabilitation Act.

5. The complaint fails to state a claim against the University officials in their individual capacities under 42 U.S.C. § 1983 because:

    a. Defendants Johnson and Rice had no personal involvement in any violation of plaintiff's rights.

    b. Plaintiff suffered no deprivation of a constitutionally protected property or liberty interest.

    c. Plaintiff received adequate procedural due process.

d. Plaintiff suffered no retaliation for the exercise of free speech rights.

e. Defendants are entitled to qualified immunity because they did not violate any clearly established right of due process or free speech.

f. The intra-corporate conspiracy doctrine bars plaintiff's claim of conspiracy.

6. The complaint fails to state a claim against the University officials in their individual capacities under state law because they have absolute immunity under Tenn. Code Ann. § 9-8-307(h).

The affidavits of President Johnson and Chancellor Rice are submitted in support of defendants' motion, and to the extent the court relies on those affidavits, defendants have moved in the alternative for summary judgment.

ARGUMENT

I. The Court lacks subject matter jurisdiction over plaintiff's claim against The University of Tennessee and University officials in their official capacities under 42 U.S.C. §§ 1981 and 1983 and under state law.

A. The Eleventh Amendment bars plaintiff's claims under 42 U.S.C. § 1981 and under state law.

The Eleventh Amendment bars plaintiff's claims against The University of Tennessee and University officials in their official capacities under § 1981 and under state law because the University is an arm or *alter ego* of the State of Tennessee. *See Jain v. University of Tennessee at Martin*, 670 F.Supp. 1388, 1390 (W.D. Tenn. 1987), *aff'd without opinion*, 843 F.2d 1391 (6th Cir. 1988); *Gross v. University of Tennessee*, 448 F.Supp. 245, 247-48 (W.D. Tenn. 1978), *aff'd*, 620 F.2d 109 (6th Cir. 1980).

Eleventh Amendment immunity bars not only claims

under federal law, but also state law claims brought in federal court under supplemental jurisdiction. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 121, 104 S.Ct. 900, 919, 79 L.Ed.2d 67 (1984). There has been no waiver or abrogation of the University's Eleventh Amendment immunity with respect to an action under 42 U.S.C. § 1981. Nor has there been any waiver of the University's immunity from suit under state law in a federal court action. *See, e.g., Boyd v. Tennessee State University*, 848 F.Supp. 111, 114-15 (M.D. Tenn. 1994). Therefore, the Eleventh Amendment is an absolute bar to plaintiff's claims against the University and University officials in their official capacities under § 1981 and under state law.

B. The University and University officials in their official capacities are not "persons" subject to suit under 42 U.S.C. § 1983.

Because The University of Tennessee is an arm or *alter ego* of the State of Tennessee, the University and University officials in their official capacities are not subject to suit under 42 U.S.C. § 1983. The United States Supreme Court held in *Will v. Michigan Department of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45 (1989), that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Therefore, the court lacks subject matter jurisdiction over plaintiff's § 1983 claims for compensatory and punitive damages against the University and University officials in their officials capacities.

II. The complaint fails to state a claim of national origin discrimination under Title VI or § 1981.

The complaint fails to state a claim for relief under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, or 42 U.S.C. § 1981 because it alleges no specific facts from which this court could draw a reasonable inference that plaintiff was discriminated against on the basis of his national origin. In civil rights cases, conclusory allegations without supporting allegations of specific facts fail to state a claim. *See Lillard v. Shelby County Bd. Of Educ.*, 76 F.3d 716, 726 (6th Cir. 1996); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986).

Plaintiff's claim of national origin discrimination consists of the wholly conclusory allegation that University rules were applied differently to him because of his national origin (complaint ¶¶ 33 & 37). Plaintiff supports this conclusory allegation with nothing but two vague and generalized allegations about application of the back row rule and dress code to "caucasian" students. (Complaint ¶¶ 31 & 40). The complaint includes no facts whatsoever in support of the conclusory allegation that University rules concerning "discipline, response to inquiries and grading" (Complaint ¶ 37) were applied differently to plaintiff because of his national origin.

The plaintiff's meager allegations about application of the back row and dress code to caucasian students offer no factual support for a claim of national origin discrimination because they state nothing about the *national origin* of the caucasian students. Merely alleging that a student is "caucasian" offers no facts from which to draw any inference about the student's national origin.

In addition, these allegations fail to include specific facts showing that the caucasian students with whom plaintiff compares himself were similarly situated to him. By analogy to Title VII disparate treatment cases, plaintiff must show that the students to whom he compares himself were similarly situated to him *in all* respects. Cf. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992). In *Mitchell*, the Sixth Circuit held that a disparate treatment plaintiff must show that comparables "have engaged in the same conduct without such differentiating or mitigating circumstance that would distinguish their conduct or the employer's treatment of them for it." The complaint in this case fails to allege specific facts showing that caucasian students "engaged in the same conduct without . . . differentiating or mitigating circumstances" that would account for any differing treatment. *Id.* Therefore, the complaint fails to allege sufficient facts to support the conclusion that caucasian students were in all respects similarly situated to plaintiff but treated more favorably.

Nor is plaintiff's allegation of two isolated remarks sufficient to state a claim of discrimination on the basis of national

origin. (Complaint ¶¶ 38 & 39.) These isolated remarks are at most ambiguous and do not raise an inference of discriminatory animus. *See Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1025-26 (6th Cir. 1993); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989).

Furthermore, these isolated remarks were made by only two members of the Ad Hoc Appeals Committee of the College of Dentistry (complaint ¶¶ 18, 19, 38 & 39). Thus, even if an inference of discriminatory animus could be drawn from remarks, that animus could not be attributed to the multitude of defendants plaintiff has named in this action. Indeed, even if an inference of animus could be attributed to all members of the Appeals Committee, that body was authorized only to make a recommendation to Dean William Slagle of the College of Dentistry, who was the decision maker in this matter. (Affidavit of Rice ¶ 5.) There is no allegation of fact from which the court could draw an inference that Dean Slagle was even aware of the alleged remarks, much less that they played any part in the decision he made. Nor is there any other allegation of fact from which the court could draw an inference of discriminatory animus on the part of Dean Slagle against plaintiff.

The complaint in this action consists of nothing but plaintiff's conclusory allegations and subjective belief that the was discriminated against on the basis of his national origin. The complaint is therefore insufficient to state a claim upon which relief can be granted, and the court should dismiss the Title VI and § 1981 claims in their entirety.[1]

III. The complaint fails to state a claim of disability discrimination under Title II of the Americans

---

[1]To the extent the complaint purports to state a separate cause of action under Title VI and § 1981 for "retaliation," it fails because there is no basis in the plain language of either statute to recognize such a separate cause of action. In enacting Title VII's prohibition against employment discrimination, Congress expressly included a prohibition against "retaliation." 42 U.S.C. § 2000e-3. If Congress had intended to create such a separate cause of action under Title VI and § 1981, it would have done so by express provision.

with Disabilities Act and § 504 of the Rehabilitation Act.

A. The complaint fails to allege facts showing that plaintiff is an "individual with a disability."

The complaint fails to include specific factual allegations sufficient to allow even an inference that plaintiff is an "individual with a disability" within the meaning of Title II of the Americans with Disabilities Act (Title II) and § 504 of the Rehabilitation Act (§ 504). Both acts define "disability" as "a physical or mental impairment which [that] substantially limits one or more . . . major life activities . . . ." 29 U.S.C. § 706(8)(B); 42 U.S.C. § 12102. Plaintiff alleges that he

> suffers from numbness and pain in his neck, arm and back and severe headaches; nervousness and distraction if another person(s) is in close proximity to him especially behind him; and difficulty hearing well, i.e. work recognition/discrimination, when background noise increases.

(Complaint ¶ 28.) Plaintiff's alleged physical impairment is not the kind of severe and insurmountable disability the ADA and Rehabilitation Act are designed to protect. The Fourth Circuit has explained the nature of a protected disability as follows:

> The Rehabilitation Act assures that truly disabled, but genuinely capable, individuals will not face discrimination . . . because of stereotypes about the insurmountability of their handicaps. It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared. Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage . . . .

Forrisis v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986)(citation

omitted). Plaintiff's alleged pain, headaches, nervousness, distraction, and difficulty hearing well *when background noise increases* are commonplace and widely shared by the average person in the general population. They are not the kind of severe and insurmountable impairments Congress intended to protect. Furthermore, plaintiff fails to allege any facts from which the court could conclude that the alleged impairment substantially limits a major life activity.

Because the complaint in this action fails to allege facts from that would support a reasonable inference that plaintiff is an "individual with a disability," plaintiff has failed to show an essential element of a cause of action for disability discrimination. *See Doherty v. Southern College of Optometry*, 862 F.2d 570, 573 (6th Cir. 1988), *cert. denied*, 493 U.S. 810, 110 S.Ct. 53, 107 L.Ed.2d 22 (1989). Therefore, the court should dismiss plaintiff's claim under Title II of the ADA and § 504 for failure to state a claim upon which relief can be granted.

B. The complaint fails to allege facts showing that any action was taken against plaintiff solely by reason of his disability.

Even if plaintiff were an "individual with a disability," the complaint nevertheless fails to state a claim upon which relief can be granted because it does not allege facts from which the court could conclude that adverse action was taken against plaintiff "solely by reason of . . . his disability." 29 U.S.C. § 794. To state a claim under both Title II of the ADA and § 504, a plaintiff must show that he was excluded from participation in, denied the benefits of, or subjected to discrimination under a federally funded program *solely by reason of his disability. Sandison v. Michigan High School Athletic Ass'n*, 64 F.3d 1026, 1031 & 1036 (6th Cir. 1995). Furthermore, to recover monetary damages under Title II of the ADA and § 504, a plaintiff must prove *intentional* discrimination and not just discriminatory effect. *See Wood v. President & Trustees of Spring Hill College*, 978 F.2d 1214, 1220-21 (11th Cir. 1992)(citing controlling precedent of the Supreme Court on Title VI remedies, *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582,

103 S.Ct., 3221, 77 L.Ed.2d 866 (1983)).[2] In the present case, the complaint fails to allege that defendants Bowles and Fletcher, the two professors who have a classroom rule against sitting on the back row (complaint ¶ 64), had any knowledge of plaintiff's alleged disability at the time they applied the rule to plaintiff and allegedly harassed him for violating the rule (complaint ¶¶ 70, 71). Specifically, plaintiff does not, and cannot, allege that he ever notified defendants Bowles and Fletcher of his alleged disability before he deliberately chose to violate their classroom rule against sitting on the back row. Furthermore, the complaint does not, and cannot, allege that the members of the Academic Statues Committee had any knowledge of plaintiff's alleged disability at the time they heard the academic charge against plaintiff or violating the back row rule.

In the absence of any factual allegation showing that defendants *knew* plaintiff was an "individual with a disability," there is no basis for an inference that defendants intentionally discriminated against plaintiff solely by reason of his disability. In *Wynne v. Tufts University School of Medicine*, 976 F.2d 791 (1st Cir. 1992), the First Circuit held that for an academic institution "'to be held liable under the Rehabilitation Act, [it] must know or be reasonably expected to know of [a student's] handicap.'" *Id.* at 795 (quoting *Nathanson v. Medical College of Pa.*, 926 F.2d 1368, 1381 (3rd Cir. 1991). The First Circuit further recognized that "[a] relevant aspect of this inquiry is whether the student ever put the medical school on notice of his handicap by making "'a sufficiently direct and specific request for special accommodations.'" *Wynne* at 795 (quoting *Nathanson* 926 F.2d at 1386).[3] In this case, plaintiff does not,

---

[2]The Rehabilitation Act expressly provides that the "remedies, procedures, and rights" available in Title VI actions shall apply to actions under § 504. 29 U.S.C. § 794(a)(2). Similarly, Title II of the ADA expressly provides that the "remedies, procedures, and rights" available in § 504 actions shall apply to actions under Title II. 42 U.S.C. § 12133.

[3]Construing the employment provisions of the ADA, the Seventh Circuit has held that "knowledge of the disability is a prerequisite to finding liability." *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130,

and cannot, allege that he ever put the College of Dentistry on notice of his alleged disability by making a direct and specific request for an accommodation with respect to the back row rule or any other rule. Therefore, defendants' application of the back row cannot constitute intentional discrimination against plaintiff "solely by reason of his disability." Furthermore, plaintiff does not, and cannot, allege that he was prohibited from sitting on the next-to-last row in defendant Bowles' and Fletcher's classrooms. Plaintiff only alleges that he was barred from sitting on the very back row and acknowledges that he was given the option to "move forward." (Complaint ¶ 70.) The only reasonable inference that can be drawn from this allegation is that plaintiff could have sat on the next-to-the last row. Plaintiff has alleged no facts that would support an inference that his alleged disability would not have been reasonably accommodated by his sitting in the next-to-last row rather than the last row.

Plaintiff has failed to allege sufficient facts to allow an inference that defendants took any action against him solely because of this disability. Therefore, the court should dismiss plaintiff's claim of disability discrimination for failure to state a claim upon which relief can be granted.

C. The complaint fails to state a claim or retaliation under the Americans with Disabilities Act.

Although the Americans with Disabilities Act (but not the Rehabilitation Act) does create a separate cause of action for "retaliation," 42 U.S.C. § 12203(a), plaintiff's claim of retaliation consists of nothing but the purely conclusory allegation that "[t]he conduct of the Defendants against Plaintiff after he voiced his objection to the rules and the dress code were in retaliation for Plaintiff's opposition." (Complaint ¶ 73.) Plain-

---

1134 (7th Cir. 1996)("[a]n employer that has no knowledge of an employee's disability cannot be held liable for not accommodating the employee"). Similarly, in *Hedberg v. Indiana Bell Telephone Co., Inc.*, 47 F.3d 929, 932 (7th Cir. 1994), the Seventh Circuit held that "an employer cannot fire an employee 'because' of a disability unless it knows of the disability."

tiff offers no specific factual support for this conclusory allegation. For example, he does not specify when he voiced his objection, whether his objection was based on the alleged discriminatory nature of the rules, or what conduct of defendants occurred after plaintiff voiced his objection. Plaintiff's conclusory allegation is insufficient to allow the inference of any causal connection between his "opposition" and any adverse action against him. Therefore, the court should dismiss plaintiff's claim of retaliation for failure to state a claim upon which relief can be granted.

IV. The complaint fails to state a claim against the University officials in their individual capacities under Title VI, the Rehabilitation Act, or the ADA.

The University officials cannot be held liable in their individual capacities for a violation of Title VI, the Rehabilitation Act, or the ADA. Under the plain language of all three statutes, The University of Tennessee is the only proper defendant with respect to plaintiff's claims. Title VI and the Rehabilitation Act prohibit discrimination by a "program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d; 29 U.S.C. § 794. Under both statutes, the term "program or activity" is defined as all the operations of, *inter alia*, "a college, university, or other postsecondary institution, or a public system of higher education. . . ." 42 U.S.C. § 2000d-41(2)(A); 29 U.S.C. § 794(b). The statutory definition of "program or activity" includes no reference to individual officials of a college or university. Similarly, Title II of the ADA prohibits discrimination by a "public entity" and defines that term as "any State of local government. . . ." 42 U.S.C. § 12131(1)(A). The statutory definition of "public entity" includes no reference to individual officials of a state or local government. Therefore, under the plain language of these statutes, the individual defendants in this action are not liable in their individual capacities because they are not a "program or activity" or a "public entity" that receives federal financial assistance. *See Bougher v. University of Pittsburg*, 713 F.Supp. 139, 143 (W.D. Pa. 1989), *aff'd*. 882 F.2d 74 (3rd Cir. 1989)(university officials are not recipients of federal funds and thus not liable under Title IX).

Furthermore, in the employment discrimination context, the great weight of appellate authority holds that individual agents of an employer are not personally liable under Title VII or the ADA. *See, e.g. EECO v. AIC Security Investigation, Inc.*, 55 F.3d 1276, 1279 (7th Cir. 1995)(no personal liability under the ADA); *Miller v. Maxwell's Int'l, Inc.*, 991 F2d 583, 587-88 (9th Cir. 1993)(no personal liability under Title VII or ADEA). Thus even though the statutory definition of "employer" under both Title VII and the ADA includes the term "any agent," the appellate courts consistently hold that Congress did not intend to impose personal liability on the agents of any employer.

If Congress did not intend to impose personal liability under Title VII or the ADA (Title I) by express inclusion of the term "agent", it is inconceivable that Congress intended to do so under Title VI, the Rehabilitation Act, or Title II of the ADA where the statutory definitions include no reference to agents or officials of the institutional entity that receives federal funds. Therefore, the court should dismiss the Title VI, Rehabilitation Act and ADA claims against the individually-named University officials because they cannot be held personally liable for a violation of those statutes.

V. The complaint fails to state a claim against the University officials in their individual capacities under 42 U.S.C. § 1983.

A. Defendant Johnson and Rice had no personal involvement in any constitutional violation.

President Johnson and Chancellor Rice cannot be held liable in their individual capacities under 42 U.S.C. § 1983 because they had no personal involvement in any violation of plaintiff's rights under federal law. Liability under § 1983 cannot be based on principles of *respondeat superior*. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Rizzo v. Goode*, 423 U.S. 362, 96

S.Ct. 598, 46 L.Ed.2d 561 (1976).[4] Applying the rule against *respondeat superior* liability, the Sixth Circuit Court of Appeals has established that § 1983 liability of supervisory personnel must be based on more than the right to control. *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir.), *cert. denied*, 469 U.S. 845, 105 S.Ct. 154, 83 L.Ed.2d 93 (1984) There must be a showing that the supervisor "encouraged the specific incident or in some other way directly participated in it." *Id.* Mere failure to act is not sufficient to establish personal liability in damages under § 1983. *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1989). Officials are personally liable "only for their own unconstitutional behavior." *Id.*

In *Bellamy*, the Sixth Circuit found that even though the supervisors had knowledge of some incidents of alleged harassment against the plaintiff, that knowledge was insufficient to subject them to personal liability under § 1983. *Id.* Similarly, in *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 788, 102 L.Ed.2d 780 (1989), the Sixth Circuit refused to impose personal liability under § 1983 where the plaintiff alleged only that supervisors were aware of alleged unlawful acts and did not take appropriate action. Relying on its holdings in *Bellamy* and *Poe*, the Sixth Circuit later refused to impose personal liability on supervisory personnel for their failure to conduct an adequate investigation of claims of racial harassment, holding that the failure was insufficient to meet the *Bellamy* standard of encouraging or directly participating in the specific incident of misconduct. *Knop v. Johnson*, 977 F.2d 996, 1014 (6th Cir. 1992). *Accord Lillard v. Shelby County Board of Education*, 76 F.3d 716, 727 (6th Cir. 1996)(refusing to impose personal liability on supervisory personnel simply because some incidents of sexual harassment were brought to the attention of supervisors); *Franklin v. Gilless*, 870 F.Supp. 792,

---

[4]In Rizzo, the Supreme Court refused to impose personal liablity on the mayor, city managing director, and police commissioner for constitutional violations by the city's police officers because "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy . . . showing their authorization of approval or such misconduct." Rizzo, 423 U.S. at 371, 96 S.Ct. at 604.

796 (W.D. Tenn. 1994)(McCalla, J.)

The complaint in this case does not, and cannot, allege facts from which this court could infer that President Johnson and Chancellor Rice "encouraged or in some other way directly participated in," *Bellamy*, 729 F.2d at 421, the specific incidents of unlawful acts allegedly committed by officials in the College of Dentistry. The complaint alleges no specific acts by President Johnson and Chancellor Rice other than their ruling on plaintiff' voluntary and discretionary appeal to them of action taken by officials in the College of Dentistry. (Complaint ¶ 55.) At most, therefore, plaintiff has alleged that President Johnson and Chancellor Rice were made aware of plaintiff's allegations of unlawful acts --after the fact of those acts--and failed to provide the redress plaintiff wanted. The Sixth Circuit's holdings in *Bellamy*, *Poe*, and *Knop* require the conclusion that plaintiff's complaint fails to satisfy the standard for personal liability under § 1983.

In *Copeland v. Machulis*, 57 F.3d 476 (6th Cir. 1995), the Sixth Circuit refused to impose personal liability in circumstances very similar to the present case. The supervisor in *Copeland* established by affidavit that he was not involved in the specific incident of unlawful activity -- removing money from the plaintiff's prison account -- and that his only action with respect to the matter alleged in the complaint was ruling on the plaintiff's appeal to him. *Id.* at 481. In this case, the affidavits of President Johnson and Chancellor Rice likewise establish that they had no personal involvement in any of the specific incidents of allegedly unlawful acts, that they had no knowledge of those acts prior to the time of plaintiff's appeal to them, and that their only involvement in the matters alleged in the complaint was to rule on plaintiff's voluntary and discretionary appeal to them. (Affidavit of Johnson at ¶¶ 4-8; Affidavit of Rice at ¶¶ 4-10.)

President Johnson and Chancellor Rice did not encourage or in any other way directly participate in any violation of plaintiff's federal rights, and they cannot be held liable under § 1983 in their individual capacities. Therefore, the court should dismiss this action against President Johnson and

Chancellor Rice in their individual capacities.

B. Plaintiff suffered no deprivation of a constitutionally protected property or liberty interest.

The protections of procedural due process under the Fourteenth Amendment apply only in the event of a deprivation of a "property" or "liberty" interest. *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 82, 98 S. Ct. 948, 951, 55 L. Ed. 2d 124 (1976). The complaint in this case is wholly insufficient to show that plaintiff has suffered deprivation of a property or liberty interest. Plaintiff does not, and cannot, allege that defendants dismissed him from the College of Dentistry. Therefore, assuming that he had a constitutionally protected property interest in continued enrollment, the complaint alleges no action on the part of defendants to deprive him of that interest. The complaint alleges only that a letter of reprimand was added to his academic record, that he was placed on probation, and that he was warned of dismissal in the event of other academic infractions. (Complaint ¶ 53.) Therefore, plaintiff can prove no set of circumstances showing that defendants deprived him of a constitutionally protected property interest in continued enrollment in the College of Dentistry.

Furthermore, plaintiff's allegation that defendants failed to follow the University's own procedures (including failure to offer him a formal, evidentiary hearing under the Tennessee Uniform Administrative Procedures Act) does not state a claim for deprivation of a property interest. The Sixth Circuit has held that "[v]iolation of a state's formal procedure . . . does not in and of itself implicate constitutional due process concerns." *Purisch v. Tennessee Technological University*, 76 F.3d 1414, 1423 (6th Cir. 1996). Furthermore, plaintiff was not entitled to a hearing under the TUAPA because its provisions are applicable, in the first place, only if a constitutionally protected property or liberty interest is at stake. *See* Tenn. Code Ann. § 4-5-102(3).

Nor can plaintiff prove any set of circumstances showing that defendants deprived him of a liberty interest. Even if the

letter of reprimand added to plaintiff's academic record included the kind of stigmatizing statements necessary to implicate plaintiff's liberty interest, the statements were *not* made in conjunction with dismissal of plaintiff from the College of Dentistry and therefore did not invoke the procedural protections of due process. *See Paul v. Davis*, 424 U.S. 693, 708-09, 96 S.Ct. 1155, 1164, 47 L Ed.2d 405 (1976). The defamatory character of statements, standing alone, does not implicate procedural due process. *Id.* Furthermore, even if the statements otherwise implicated plaintiff's liberty interest, plaintiff has not alleged that defendants published the statements. Proof of publication is essential to proof of deprivation of a liberty interest. *Bishop v. Wood*, 426 U.S. 341, 348, 96 S. Ct. 2074, 2079, 48 L. Ed. 2d 684 (1976).

C. Plaintiff received adequate procedural due process.

Even if plaintiff could establish that he was entitled to the protections of constitutional due process, the Fourteenth Amendment does not require more procedural protection than defendants provided plaintiff in this case. The Supreme Court said in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) that "[t]he essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and an opportunity to meet it.'" *Id.* at 909. Furthermore, even in the context of suspension of a student from public school for disciplinary reasons, all that is required is an "'informal give-and-take' between the student and the administrative body . . . that would, at least, give the student 'the opportunity to characterize his conduct and put it in what he deems the proper context.'" *Horowitz*, 98 S. Ct. at 953 (quoting *Goss v. Lopez*, 419 U.S. 565, 584, 95 S. Ct. 729, 741, 42 L. Ed. 2d 725 (1975). The complaint in this case reveals that plaintiff had a least two opportunities to characterize his conduct in violating the back row rule and put it in what he deems the proper context. (Complaint ¶¶ 53 & 54.) Therefore, even if plaintiff was entitled to procedural due process, he received all the process he was due under the circumstances.

D. Plaintiff suffered no retaliation for the exercise of free speech rights.

The complaint fails to allege any facts supporting an inference that defendants took any action against plaintiff in retaliation for his exercise of free speech rights. The only reasonable inference that can be drawn from the facts alleged in the complaint is that any action taken against plaintiff was for his *conduct* in deliberately violating the back row rule. (Complaint ¶ 49.) There are no facts from which an inference of a causal connection between any constitutionally protected speech by plaintiff and any adverse action taken against him by defendants.

E. Defendants are entitled to qualified immunity because they did not violate any clearly established right of due process or free speech.

Even if the complaint in this case were sufficient to show a violation of plaintiff's due process or free speech rights, the defendants are entitled to qualified immunity because of any due process or free speech right plaintiff had under these circumstances was not a "clearly established constitutional right of which a reasonable person would have known." *Christophel v. Kukulinsky*, 61 F.3d 479, 484 (6th Cir. 1995); *accord Purisch*, 76 F.2d 1414, 1422-24. No reasonable person would have known that plaintiff was entitled to any more procedural process than the received when defendants were not proposing to dismiss him from the College of Dentistry. Nor would any reasonable person have known that enforcing a classroom rule would constitute a violation of plaintiff's free speech rights simply because plaintiff's deliberate violation of the rule was accompanied by statements of opposition to the rule.

F. The intra-corporate conspiracy doctrine bars plaintiff's claim of conspiracy.

Plaintiff's claim of conspiracy (complaint ¶ 60) is barred by the intra-corporate conspiracy doctrine. All individual defendants in this action are employees of The University of Tennessee. (Complaint ¶¶ 3-22.) The University of Tennessee is

a legal entity (a body corporate) created by the State of Tennessee, Tenn. Code Ann. § 49-9-101 *et seq.* (Complaint ¶ 2.) Under the intracorporate conspiracy doctrine, the University cannot conspire with its own employees; nor can employees of the University form a conspiracy among themselves. *See Johnson v. Hills & Dales General Hospital*, 40 F.3d 837, 840 (6th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1698 (1995); *Hull v. Cuyahoga Valley Board of Education*, 926 F.2d 505, 511 (6th Cir. 1991).

VI. The complaint fails to state a claim against the University officials in their individual capacities under state law because they have absolute immunity under Tenn. Code Ann. § 9-8-307(h).

Tenn. Code Ann. § 9-8-307(h) provides that

> [s]tate officers and employees are absolutely immune from liability for acts or omissions within the scope of the officer's or employee's office or employment, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain.

Therefore, the individual defendants have absolute immunity against plaintiff's claim of negligent infliction of emotional distress. Furthermore, plaintiff's claim of intentional infliction of emotional distress is based on a purely conclusory allegation of malice. In the absence of any specific factual allegations supporting an inference of malice on the part of defendants, the court should dismiss both the negligent and intentional infliction of emotional distress claims under Tenn. Code Ann. § 9-8-307(h).

CONCLUSION

For the reasons stated above, defendants respectfully request that the court dismiss the complaint with prejudice or, in the alternative, enter summary, judgment in favor of defendants.

Respectfully Submitted,

Beauchamp E. Brogan
General Counsel
The University of Tennessee

BY: /s/
Odell Horton, Jr.
Associate General Counsel
847 Monroe Avenue
Suite 241
Memphis, Tennessee 38163
(901) 448-5615

CERTIFICATE OF SERVICE

I certify that I have mailed a copy of the foregoing Memorandum in Support of Defendants' Motion to Dismiss or for Summary Judgment to Connie Westbrook, Esq., plaintiff's counsel, by first class mail this 15th day of April 1996.

/s/
Attorney

EXHIBIT G – PLAINTIFF'S MEMORANDUM OF LAW – FILED JUNE 19, 1996

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

SAMAD SALEHPOUR,

Plaintiff,

vs. NO. 96-2217-D/V

UNIVERSITY OF TENNESSEE, et al. JURY DEMANDED

Defendants.

PLAINTIFF'S MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, Samad Salehpour, by and through counsel of record, and in response to Defendants' Motion to Dismiss and/or for Summary Judgment would state to the Court as follows:

STATEMENT OF THE CASE

1. Plaintiff filed his original Complaint on February 14, 1996, and his First Amendment to Complaint on March 18, 1996.

2. Defendant University of Tennessee filed its Motion for Extension of Time to respond to Complaint on February 28, 1996; this Motion was granted by the Court and entered on the docket on February 29, 1996.

3. Defendants filed their Motion to Dismiss and/or for Summary Judgment on or about April 15, 1996; this Memorandum is in response to this Motion.

STATEMENT OF FACTS

Defendants Rice and Johnson have moved for summary judgment. However, Defendants Rice and Johnson have failed to set forth a statement of facts as required by Local Rule 11(d)(2) which is set forth as follows:

> On every motion for summary judgment, in addition to citations to appropriate legal authorities, **the proponent of the motion shall designate in the accompanying memorandum by serial numbering each material fact upon which the proponent relies in support of the motion** and shall affix to the memorandum copies of the precise portions of the record relied upon as evidence of each material fact. If the proponent contends that the opponent of the motion cannot produce evidence to create a genuine issue of material fact, the proponent shall affix to the memorandum copies of the precise portions of the record relied upon as evidence of this assertion. (emphasis added).

Thus, Plaintiff is unable to "respond to the [Defendants Rice's and Johnson's] numbered designations, using the corresponding serial numbering" as required by Local Rule 11(d)(3).

STANDARD OF REVIEW

Rule 12(b)(6),F.R.C.P., Failure to State a Claim

The applicable standard of review Rule 12(b)(6) dismissals for civil rights claims is set out in *Brooks v. American Broadcasting Companies, Inc.*, 932 F.2d 495 (6th Cir. 1991), *cert. denied*, _ U.S. _, 114 S.Ct. 609, 126 L.Ed.2d 574 (1993).

> Dismissals of complaints under the civil rights statutes are scrutinized with special care. A complaint need not set down in detail all the particularities of a plaintiff's claim against a defendant. Rule 8(a)(2) simply requires 'a short and plain statement of the claim showing that the pleader is entitled to relief....' Fed.R. Civ.P. 8(1)(2). All a complaint need do is afford the defendant 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.' [citation omitted]. A motion to dismiss under Rule 12(b)(6) should not be granted 'unless *it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.*'

And, in *Lilliard v. Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996), the court elaborated on the standard of review.

> "'A complaint need not set down in detail all the particularities of a plaintiff's claim,'" but must simply "give the defendant 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" (citations omitted). It is plain that, although liberal, the standard does require that a plaintiff plead more than bare legal conclusions. "In practice, a ... complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory." (citations omitted). This court has held, in the context of a civil rights claim, that conclusory allegations of unconstitutional conduct without specific factual allegations fail to state a claim under section 1983. (citation omitted). "Some factual basis for such claims must be set forth in the pleadings."

Id. at 726. Complaints, subject to a Rule 12(b)(6) dismissal motion, must be evaluated on a case-by-case basis. *Frazier v. Southeastern Pa. Transp. Auth.*, 785 F.2d 65, 68 (3rd Cir. 1986). In addressing the evaluation to be conducted by the

court, the *Frazier* court stated that the crucial question to be answered is "whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." *Id.*

> At the same time, however, a court cannot expect a complaint to provide proof of plaintiff's claims, nor a proffer of all available evidence. In civil rights cases. . . much of the evidence can be developed only through discovery. While plaintiffs may be expected to know the injuries they allegedly have suffered, it is not reasonable to expect them to be familiar at the complaint stage with the full range of the defendants' practices under challenge.

Id.

Rule 56, F.R.C.P., Summary Judgment

The burden on the party moving for summary judgment is set forth as follows:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). This burden "may be discharged by 'showing'--that is, pointing out to the district court--that there is an absence of the evidence to support the nonmoving party's case." *Id.* at 325. "It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case." *Id.* at 328 (White J. concurring).

Only after the moving party satisfies its burden[1] by coming forward with a properly supported motion for summary judgment is the nonmoving party required to produce "sufficient evidence[2] supporting the claims factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), *quoting First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* at 248. Whether a fact is material is to be determined by the applicable substantive law; thus, "[f]actual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248.

In determining whether summary judgment is appropriate, the evidence propounded by the nonmoving party is to be believed with all justifiable inferences drawn in his favor. *Anderson* at 255; *Matsushita* at 587; *Adkins* at 399. The district court is to apply the "substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson* at 252, 254. Thus, in the case *sub judice*, the "summary judgment inquiry as to whether a genuine issue exists [is] whether the evidence presented is such that a jury applying [the preponderance of the evidence] standard could reasonably find for either the plaintiff or defendant." *Id.* at 255.

Most importantly, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. "Credibility determinations, the weighing of the evidence, and the draw-

---

[1] *Celotex* at 317.

[2] The nonmoving party must come forward with "specific facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), *quoting* Rule 56(e), F.R.C.P.

ing of legitimate inferences from the facts are jury functions, not those of the judge." *Id.* at 255.

ARGUMENT[3]

Defendants have set up their Argument in outline form. Thus, Plaintiff will respond accordingly.

I. The Court does not lack subject matter jurisdiction over Plaintiff's claims against the University of Tennessee and University officials in their official capacities under 42 U.S.C. §§ 1981 and 1983; Plaintiff has not alleged a claim against the University of Tennessee and University officials in their official capacities under state law.

A. The Eleventh Amendment does not bar plaintiff's claims under 42 U.S.C. §1981; Plaintiff has not alleged a claim against the University of Tennessee and University officials in their official capacities under state law.

Addressing the state law claims first, Plaintiff has not alleged a claim against the University of Tennessee or the individual Defendants in their official capacities under state law. Plaintiff's intent by placing the language, "individually-named Defendants only," in the caption of Counts IV and V was to designate that these claims are brought against the individually-named Defendants in their individual capacities

---

[3]The Exhibits attached to this Memorandum are documents from the record as follows:

Exhibit A - Complaint filed on February 14, 1996.

Exhibit B - Excerpts from documents attached to Certificate of Samad Salehpour filed comtemporaneously herewith. Since the document pages are unnumbered, Plaintiff has provided page numbers marked in red in the lower right-hand corner.

Exhibit C - Excerpts from Affidavit of William R. Rice filed on or about April 15, 1996.

Exhibit D - Excerpts from Centerscope Student Handbook filed contemporaneously herewith.

only. Plaintiff has no opposition to dismissal of claims not alleged.

As to claims arising under 42 U.S.C. §1981, the Tennessee legislature specifically states that the "University of Tennessee shall retain its identity and status as a legal entity..." T.C.A. §49-7-206. A "legal entity" is "[a]n entity, other than a natural person, who has sufficient existence in legal contemplation that it can function legally, be sued or sue and make decisions through agents as in the case of corporations." Black's Law Dictionary 804 (5th ed. 1979). Although an arm of the State of Tennessee, the University of Tennessee is, by statute, a "legal entity" which can be sued.[4] Therefore, Defendants' motion must be denied.

In the alternative, suits against state officials or employees in their official capacities are not considered suits against the state for purposes of prospective relief. *Freeman v. Michigan Dept. of State*, 808 F.2d 1174, 1179 (6th Cir. 1987). Thus, Eleventh Amendment immunity is not applicable to the §1981 claims against the University officials being sued in their official capacities for declaratory and injunctive relief. Thus, Defendants motion as it relates to prospective relief must be denied.

B. The University and University officials in their official capacities are not "persons" subject to suit for monetary damages under 42 U.S.C. §1983.

Plaintiff does not dispute that the University and University officials in their official capacities are not "persons" subject to suit for "monetary damages" under §1983. However, the University officials in their official capacities are subject to suit under §1983 for prospective relief. Suits against state officials or employees in their official capacities

---

[4]The cases relied on by Defendants do not discuss T.C.A. §49-7-206 and it appears this statute was not brought to the Court's attention. Plaintiff should not be penalized by the omission in another plaintiff's argument.

are not considered suits against the state for purposes of prospective relief. *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14, 105 S.Ct. 2099, 3106, n. 14, 87 L.Ed.2d 114 (1985); *Ex parte Young*, 209 U.S. 123, 159-160, 28 S.Ct. 441, 477, 52 L.Ed. 714 (1908).[5] Thus, Defendants motion as it relates to prospective relief must be denied.

II. The complaint states a claim of national origin discrimination under Title VI and §1981.

Defendants argue that Plaintiff's claims brought pursuant to Title VI and §1981 are inadequately plead. (Defendants' Memorandum, pp. 5-7).

In *Brooks*, the Rule 12(b)(6) dismissal of plaintiff's claims brought pursuant to §1981 and §1985 by the district court was affirmed on appeal. *Brooks*, 932 F.2d at 498-99. The §1981 claim was dismissed because it "failed to allege state action" and the "allegations were fatally vague and conclusory in omitting any mention of the laws of which he allegedly was denied the full and equal benefit." *Id.* at 498. The §1985 claim was dismissed because the plaintiff "failed to plead the conspiracy in detail" and he "failed to allege any violation of a federally protected right, as required under section 1985(3)." *Id.* at 499.

In *Lilliard*, relied on by Defendants, the plaintiffs alleged only "they feared retaliation for their speech" without alleging that the defendant had "ever retaliated against them, or threatened to do so." *Lilliard*, 76 F.3d at 727. The court stated, "The fact that they may believe he retaliated against someone else is of no moment, especially in light of the complete lack of an articulated basis for such belief." *Id.*

And in *Chapman v. City of Detroit*, 808 F.2d 459 (6th Cir. 1986), also relied on by Defendants, the plaintiffs failed

---

[5] *See also Reisman v. State of Tenn. Dept. of Human Services*, 843 F.Supp. 356, 366 (W.D.Tenn. 1993), where the court granted declaratory and injunctive relief.

to set forth any factual basis for the claims they made in their complaint. *Id.* at 465.

In the case *sub judice*, Plaintiff has complied with the mandates of Rule 8, F.R.C.P., as well as satisfying *Brooks*, *Lilliard* and *Frazier*.[6] Defendant has selected some (but not all) paragraphs which relate to the Title VI and §1981 claims from Plaintiff's Complaint to use in their attack of insufficiency. Additionally, they break the selected paragraphs up rather than reading them together. Read together, paragraphs twenty-five (25), twenty-six (26), thirty (30) through thirty-three (33), and thirty-six (36) through forty-five (45) of the Complaint[7] state a cause of action not subject to dismissal under Rule 12(b)(6), F.R.C.P. Therefore, Defendants motion to dismiss must be denied.[8]

It appears that Defendant Rice is moving for summary judgment on Plaintiff's Title VI and §1981 claims. (Defendants' Motion, pp. 2-3; Defendants' Memorandum, p. 7).[9] What Defendant Rice failed to attach to his Affidavit is the enclosures Plaintiff submitted to him which set out the fact

---

[6]Defendants raise an argument about whether Plaintiff was similarly situated to other students. (Defendants' Memorandum, p. 6). This argument would appear to be directed more to a summary judgment motion which Defendants' have not raised rather than to pleading requirements. Plaintiff is unable to locate any case law which holds that a civil rights plaintiff must plead this issue with specificity.

[7]For the convenience of the Court, Plaintiff is attaching hereto a copy of his original Complaint as Exhibit A.

[8]In the event the Court determines the Complaint lacks sufficient specificity in the stated allegations, Plaintiff requests leave of Court to amend his Complaint to satisfy the pleading requirements.

[9]Since Defendant Rice did not satisfy the requirements of Local Rule 11(d)(2) by setting forth "each material fact upon which the proponent relies in support of the motion," Plaintiff can only assume the self-serving statements made in his Affidavit are the "material facts" which he is relying upon.

that Plaintiff is a member of a minority and was being discriminated against because of his ethnicity and disability. (Exhibit B, pp. 1-3, 7-19, 22-28). Further, even though Defendant Rice is the Chancellor of the University of Tennessee, of which the College of Dentistry is a part, and was in receipt of Plaintiff's letters with enclosures, he claims to have absolutely no knowledge about the following matters:-

> a. the decision to implement a classroom rule against sitting on the back row;
> b. the decision to apply the back row rule to plaintiff;
> c. the decision to bring academic charges[10] against plaintiff for violating the back row rule;
> d. the procedures[11] employed by the College of Dentistry in bringing academic charges against plaintiff for violating the back row rule;
> e. any harassment or mocking of plaintiff for violating the back row rule;
> f. any retaliation against plaintiff for complaining about the back row rule or any other rule of the College of Dentistry; or
> g. any conspiracy to force plaintiff out of the College of Dentistry or to deprive plaintiff of constitutional rights.

(Exhibit C, p. 4). Defendant Rice then affirms that he has "never imposed any disciplinary action against plaintiff," (*Id.* at pp. 2, 4) yet attaches to his Affidavit his May 29, 1995, letter to Plaintiff which states, "I am upholding the disciplinary actions taken by Dean Slagle." (Exhibit C, Appendix C). Is Defendant Rice telling the Court he did not have author-

---

[10]The charges brought against Plaintiff were not "academic charges," they were "disciplinary charges" for which discipline was imposed. (Exhibit B, p. 63).

[11]It is inconceivable that the Chancellor of a university has absolutely no knowledge, nor any way of garnering that knowledge, about procedures which are to be followed in matters which he has appellate authority over. (Exhibit D, p. 135).

ity to reverse the decision of Dean Slagle? (*See* Exhibit D, p. 135). There remains "genuine issues of material fact" regarding Chancellor Rice's involvement and motive in upholding the discipline imposed on Plaintiff as well as his authority to sanction the impermissible conduct suffered by Plaintiff. Thus, Defendant Rice's motion for summary judgment on Plaintiff's Title VI and §1981 claims must be denied.

In the alternative, Plaintiff would move the Court, pursuant to Rule 56(f), F.R.C.P., for additional time to conduct discovery on the issue of Defendant Rice's participation in the denial of Plaintiff's statutory rights.[12]

III. The complaint states a claim of disability discrimination under Title II of the Americans with Disabilities Act and §504 of the Rehabilitation Act.

A. The complaint alleges facts showing that plaintiff is an "individual with a disability.

Defendants raise a novel argument that Plaintiff's Complaint fails to plead sufficient facts regarding his disability. (Defendants' Memorandum, pp. 8-9).

This argument appears to be one of first impression as Plaintiff is unable to locate any case law addressing how much specificity is required in pleading "disability" to withstand a Rule 12(b)(6) motion to dismiss. The two cases relied upon by Defendants are inapposite to their argument.

In *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986), the court affirmed summary judgment against the plaintiff find-

---

[12]Defendants argue, without support, that actions for retaliation are unavailable under Title VI and §1981. (Defendants' Memorandum, p. 7 n. 1). In response, Plaintiff refers the Court to the following cases which recognize actions for retaliation: *Steverson v. Goldstein*, 24 F.3d 666 (5th Cir. 1994), *cert. denied*, _ U.S. _, 115 S.Ct. 731, 130 L.Ed.2d 634 (1995); *Williams v. Carrier Corp.*, 889 F.Supp. 1528 (M.D.Ga. 1995); *Wilborn v. Primary Care Specialists, Ltd.*, 866 F.Supp. 364 (N.D.Ill. 1994), *Lewis v. American Foreign Service Ass'n.*, 846 F.Supp. 77 (D.D.C. 1993).

ing that he did not suffer from "a handicap for which he may claim relief from discrimination." *Id.* at 933. In *Doherty v.Southern College of Optometry*, 862 F.2d 570 (6th Cir. 1988), *cert. denied*, 493 U.S. 810, 110 S.Ct. 53, 107 L.Ed.2d 22 (1989), judgment was entered in favor of the defendant at the conclusion of a trial on a Rehabilitation Act claim. *Id.* at 573. Neither *Forrisi* nor *Doherty* contain any discussion about what is required to be plead in order satisfy Rule 8, F.R.C.P.[13]

In the case *sub judice*, Plaintiff has complied with the mandates of Rule 8, F.R.C.P., as well as satisfying *Brooks*, *Lilliard* and *Frazier*. Thus, Defendants' motion to dismiss must be denied.[14]

B. The complaint alleges facts showing that actions were taken against plaintiff solely by reason of his disability.

Defendants again provide no case law to support their contention that Plaintiff's Complaint lacks specificity in pleading. The cases relied on by Defendants are inapposite to this issue. In *Sandison v. Michigan High School Athletic Ass'n.*, 64 F.3d 1026 (6th Cir. 1995), the court was confronted with the issue of whether the district court erred in issuing a preliminary injunction. *Id.* at 1029-30. In *Wood v. President & Trustees of Spring Hill College*, 978 F.2d 1214 (11th Cir. 1992), the court was confronted with alleged errors in jury instructions given by the district court. *Id.* at

---

[13]Defendants state, "Plaintiff's alleged pain, headaches, nervousness, distraction, and difficulty hearing well *when background noise increases* **are commonplace and widely shared by the average person in the general population.**" (bolded emphasis added). (Defendants' Memorandum, p. 8). Defendants provide absolutely no support for this statement; thus, the Court must strike it from consideration as there is no basis to give judicial notice to such a statement.

[14]In the event the Court determines further specificity is required, Plaintiff's seeks leave to amend his Complaint to provide more specific allegations.

1217. In *Wynne v. Tufts University School of Medicine*, 976 F.2d 791 (1st Cir. 1992), the court was confronted with a summary judgment ruling of the district court. None of the cases cited by Defendants addressed sufficiency of pleading.

Plaintiff concedes he has not plead that notice was given of his disability, and seeks leave of Court to amend in the event the Court determines such an allegation is necessary. Otherwise, Plaintiff has complied with the mandates of Rule 8, F.R.C.P., as well as satisfying *Brooks*, *Lilliard* and *Frazier*. Thus, Defendants' motion to dismiss must be denied.

C. The complaint states a claim of retaliation under the Americans with Disabilities Act.

Defendants argue that Plaintiff's Complaint fails to state a claim for retaliation because Plaintiff "does not specify when he voiced his objection, whether his objection was based on the alleged discriminatory nature of the rules, or what conduct of defendants occurred after plaintiff voiced his objection." (Defendants' Memorandum, p. 12). Defendants provide no support for their position that these matters must be plead to survive a Rule 12(b)(6) dismissal. It appears Defendant is arguing that Plaintiff must provide specific dates, details of the objections made by Plaintiff and/or a chronology of specific details including dates, substance of conversations and conduct by the parties. What Defendants are seeking is discovery through pleading. That is not the purpose and intent of Rule 8, R.F.C.P., nor of *Brooks*, *Lilliard* and *Frazier*. Thus, Defendants' motion to dismiss must be denied.[15]

IV. The complaint does not state a claim against the University officials in their individual capacities under Title VI, the Rehabilitation Act, or the ADA.

---

[15]In the alternative, if the Court determines more specificity is required in the Complaint, Plaintiff seeks leave of Court to amend his Complaint to bring it into compliance with the pleading requirements determined by the Court.

Plaintiff does not oppose Defendants' arguments raised under this heading.

V. The complaint states a claim against the University officials in their individual capacities under 42 U.S.C. §1983.

A. Defendant Johnson and Rice had personal involvement in the constitutional violations.

Although Defendants Johnson and Rice[16] characterize this argument as one of sufficiency of the pleadings, they are, by submitting documents outside the pleadings, seeking summary judgment. Rule 12(b)(6), F.R.C.P.; Defendants' Motion, pp. 2-3 (Defendants specifically move for summary judgment).[17]

Plaintiff does not dispute the argument that Defendants cannot be held liable under the theory of *respondeat superior*; nor has Plaintiff alleged that they are liable under this theory. Thus, this argument is without merit.

The remainder of Defendants argument, although following along the *respondeat superior* theory, raises the issue of whether they were personally involved in the violation of

---

[16]Since this argument is only brought by Defendants Rice and Johnson, Plaintiff's use of the term "Defendants" in this portion of the response means only Defendants Rice and Johnson.

[17]The only time documents outside the pleadings have been used is when Defendant Rice's Affidavit is mentioned in the argument raised in II. (Defendants' Memorandum, p. 7; *supra* 6-8) and the Affidavits of both Defendants in this argument. Since Local Rule 11(d)(2) was not complied with by Defendants in their memorandum, Plaintiff can only assume that summary judgment is being sought under these two arguments and that they join the other Defendants under Rule 12(b)(6), F.R.C.P., for dismissal of the Complaint under the remaining arguments. Under either argument, Plaintiff respectfully points out that the burden imposed on summary judgment movants has not been satisfied by these two Defendants. *Celotex* at 323, 328.

Plaintiff's constitutional rights. (Defendants' Memorandum, pp. 15-16). Defendants' argument that they were not personnally involved is without merit. Had Plaintiff been afforded the due process to which he was entitled (Exhibit A, pp. 9-10; Exhibit D, pp. 81-82), he would not have been afforded an appeal to either Defendant. (Exhibit D, pp. 81-82). However, by denying Plaintiff his due process right and referring his disciplinary proceedings to the Academic Status Committee, he had a right to appeal the decision to both Defendants. (Exhibit D, p. 135). Thus, either of these Defendants, with full knowledge of the actions taken against Plaintiff as well as his guaranteed right to due process, had authority to reverse the disciplinary action imposed against Plaintiff and remand the case with the directive that proper due process be afforded Plaintiff. Thus, not only were they personnally involved in the denial of Plaintiff's constitutional rights, they actively participated in the violation of these rights.[18] The cases cited by Defendants are inapposite the the facts and circumstances of this case. Thus, Defendants' motion for summary judgment must be denied.

B. Plaintiff was deprived of a constitutionally protected property or liberty interest.

Liberty "denotes . . . the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, . . . and generally to enjoy those privileges long recognized. . . as essential to the orderly pursuit of happiness by free men." *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972), *quoting Meyer v. Nebraska*, 262 U.S. 390, 399. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Id.* at 573 (cites omitted). Property "denotes a broad range of interests that are secured by 'existing rules or understandings.'" *Perry v. Sindermann*, 408 U.S. 593, 601

---

[18]Defendants have not addressed the statutory violations incorporated into Count II; thus they have failed to satisfy the burden imposed on them and Plaintiff is not required to respond. *Celotex* at 323, 328.

(1972), *quoting Roth* at 577.

To determine whether adequate procedural process protections are afforded, three factors must be considered:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

"The relationship between a university and a student is contractual in nature." *Corso v. Creighton University*, 731 F.2d 529, 531 (8th Cir. 1984). A student handbook is considered part of the contractual relationship and where it is "on a printed form prepared by one party, and adhered to by another who has little or no bargaining power, ambiguities must be construed against the drafting party." *Id.* at 533.

In the case *sub judice*, the University of Tennessee Student Handbook provides rules, regulations and understandings adopted by the University Board of Trustees addressing the rights and responsiblities of students attending the University of Tennessee. (Exhibit D, p. 72) This Handbook provides a formal understanding between the University of Tennessee and its students as to what due process is afforded in the event disciplinary measures are contemplated or imposed. (Exhibit D, pp. 81-82) *See Perry* at 601.

There is a "significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct." *Board of Curatores v. Horowitz*, 435 U.S. 78, 86 (1978). Matters involving discipline require heightened procedural procection than matters involving academic decisions. *Id.* at 86-89. The Student

Handbook provides two sets of procedural rules, i.e. those that are available when discipline is to be imposed for violation of conduct rules (Exhibit D, pp. 81-82) and those that are available when academic standards are in question (Exhibit D, pp. 133-35). Not only does Defendant University of Tennessee provide the requisite heightened due process for disciplinary hearings as required by law, it provides the student with more procedural protection than it is required by law to provide. Yet, Plaintiff was denied the heightened due process afforded to other students at the University of Tennessee.

Additionally, not only was Plaintiff denied the due process guaranteed to him through his contractual relationship with Defendant University of Tennessee, he was denied the minimal due process required by the Fourteenth Amendment, particularly notice and specificity of the charges. *Dixon v. Alabama State Board of Education*, 294 F.2d 150,155 (5th Cir. 1961); *Soglin v. Kauffman*, 295 F.Supp. 978, 987 (1968). The only notice Plaintiff received of the charges brought against him was the statement, "your actions represent misconduct and unethical and unprofessional behavior." (Exhibit A, p. 10; Exhibit B, p. 63[19]). Plaintiff was never apprised of what "actions" were subject to discipline even though he requested that information. (Exhibit A, pp. 10-11). "A rule against 'misconduct' is so grossly vague that possible involvement of First Amendment rights cannot be ignored." *Soglin* at 985.

Thus, Plaintiff is guaranteed due process by the Fourteenth Amendment to the United States Constitution and has plead his constitutional due process rights as required by Rule 8, F.R.C.P., as well as satisfying *Brooks*, *Lilliard* and *Frazier*. Thus, Defendants' motion to dismiss must be denied.

---

[19]Additionally, the Centerscope page referrred to in the February 16, 1995, letter from Defendant Lynch to Plaintiff notifying him of the charges being brought does not provide a definition for "misconduct and unethical and unprofessional behavior." (Exhibit D, p. 74).

C. Plaintiff did not receive adequate procedural due process.

Plaintiff's response to "B." *supra* 12-14 adequately addresses the arguments Defendants raise under this subheading. Thus, Plaintiff relies upon his previous arguments to support his opposition to Defendants' assertion that he received adequate procedural due process. Thus, Defendants' motion to dismiss must be denied.

D. Plaintiff's Complaint adequately states a claim for retaliation when he exercised his free speech rights.

Again, Defendants cite no case law to support their contention that Plaintiff has failed to adequately state a claim for retaliation when he exercised his free speech rights. (Defendants' Memorandum, p. 19). Nor do they apprise the Court of what is, in their opinion, a necessary pleading. They refer the Court only to paragraph forty-nine (49) of Plaintiff's Complaint. (*Id.*) Plaintiff would additionally refer the Court to paragraphs thirty-seven (37) through forty-two (42), forty-seven (47) through sixty (60) and sixty-four (64) through seventy-three (73). (Exhibit A).

In the case *sub judice*, Plaintiff has complied with the mandates of Rule 8, F.R.C.P., as well as satisfying *Brooks*, *Lilliard* and *Frazier*. Thus, Defendants' motion to dismiss must be denied.[20]

E. Defendants are not entitled to qualified immunity.

Not only does the United States Constitution guarantee Plaintiff rights to due process and freedom of speech, the University reiterates these guarantees in the Centerscope Student Handbook. (Exhibit A, pp. 9-10, 13; Exhibit D, pp. 65, 81-82). Due process and freedom of speech are "clearly

---

[20]In the event the Court determines further specificity is required, Plaintiff's seeks leave to amend his Complaint to provide more specific allegations.

established constitution right[s] of which a reasonable person would have known." *Christophel v. Kukulinsky*, 61 F.3d 479, 484 (6th Cir. 1995). Thus, Defendants are not entitled to qualified immunity and their motion to dismiss must be denied.[21]

F. The intra-corporate conspiracy doctrine does not bar plaintiff's claim of conspiracy.

Defendants rely, in part, on *Johnson v. Hills & Dales General Hospital*, 40 F.3d 837 (6th Cir. 1994), *cert denied*, _ U.S. ___, 115 S.Ct. 1698 (1995), to support their argument that the intra-corporate conpiracy doctrine bars Plaintiff's claim of conspiracy. However, Defendants fail to point out to the Court that it must first be determined that the employees were acting in the scope of their employment for said doctrine to apply. *Id.* 841.

> The intracorporate conspiracy doctrine, if applied too broadly, could immunize all private conspiracies from redress where the actors coincidentally were employees of the same company. Aware of this possibility, courts have created a "scope of employment"exception that recognizes a distinction between collaborative acts done in pursuit of an employer's business and private acts done by persons who happen to work at the

---

[21]Defendants state they "were not proposing to dismiss [Plaintiff] from the College of Dentistry." (Defendants' Memorandum, p. 19). Defendants' fail to direct the Court to where in the record there is support for this statement. Plaintiff is unable to locate in the record any support for this inaccurrate statement. Thus, the Court must strike this statement from consideration in ruling on Defendants' Motion. Defendants' remaining statement, "Nor would any reasonable person have known that enforcing a classroom rule would constitute a violation of plaintiff's free speech rights simply because plaintiff's deliberate violation of the rule was accompanied by statements of opposition to the rule." (Defendants' Memorandum, pp. 19-20). This statement is illogical since Plaintiff's violation and opposition was to a rule which violates federal law. (Exhibit A, Count III). Additionally, this was not the only rule Plaintiff opposed.

same place.

Id. at 840. Plaintiff alleges with specificity the acts comprising the conspiracy and names as conspirators the individually-named Defendants only. (Complaint *passim*). Thus, the Court must first determine whether these Defendants were acting in the scope of their employment. Plaintiff relies on his arguments *infra* regarding procedures to be followed by the Court in making this determination.[22]

VI. The Defendants sued in their individual capacities are not entitled to absolute immunity under Tennessee Code Annotated (T.C.A.) §9-8-307(h).

A. Negligent Infliction of Emotional Distress.

The individual-capacity Defendants rely on T.C.A. §9-8-307(h) to support their argument that they are entitled to absolute immunity for Plaintiff's claim of negligent infliction of emotional distress. (Defendants' Memorandum at pp. 20-21). T.C.A. §9-8-307(h), in its entirety,[23] it set forth as follows:

> (h) State officers and employees are absolutely immune from liability for acts or omissions within the scope of the officer's or employee's office or employment, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain. **For purposes of this chapter**, "state officer" or "employee" has the meaning set forth in §8-42-101(3). (emphasis added).

---

[22]In the event the Court determines additional specificity in pleading is required, Plaintiff requests leave of Court to amend his Complaint to plead more specifically. Plaintiff would also request additional time to conduct discovery prior to the Court making its determination on "scope of employment."

[23]In Defendants' Memorandum, only a portion of the statute was copied.

Absolute immunity applies only for purposes of Chapter 8 of Title 9, i.e. Board of Claims. Prior to the passage of Chapter 8, a study was conducted pursuant to Senate Joint Resolution 216 of the 92nd General Assembly addressing alternatives in the area of sovereign immunity in Tennessee. In the February 29, 1984, Report of the Study Committee Created by Senate Joint Resolution 216 of the 92nd General Assembly, the Committee stated as follows:

> A third area for consideration under the waiver of immunity is whether the state should immunize employees for actions falling within the areas in which the state has waived immunity. This action would, in essence, force aggrieved parties to pursue action against the state when the cause of action arises from an incident in an activity in which the state has admitted liability. By forcing action against the state, the involved employees are protected from suit. In its research, the committee determined that it would be prudent for the state, if waiving immunity, to include provisions which would provide that a claimant not be permitted to pursue actions against both the state and involved employees. The committee's draft legislation contains language which provides that a claimant may not pursue action against a state employee if the cause of action falls within an area in which the state has waived immunity.

Id. at 11. The Tennessee General Assembly did not waive sovereign immunity for a claim of negligent infliction of emotional distress. T.C.A. §9-8-307(a)(1)(A)-(U).

As further support that absolute immunity as provided by T.C.A. §9-8-307(h) only applies to claims in which the State has waived its sovereign immunity is the General Assembly's passage of T.C.A. §9-8-307(b) which is set forth as follows:

> (b) Claims against the state filed pursuant to

> subsection (a) shall operate as a waiver of any cause of action, based on the same act or omission, **which the claimant has against any state officer or employee**. The waiver is void if the commission determines that the act or omission was not within the scope of the officer's or employee's office or employment. (emphasis added).

Thus, if a person files a claim with the Board of Claims, he/she has waived the right to go into court and file an individual-capacity suit against an officer or employee alleging claims in which the State has not waived its sovereign immunity if those claims arise out of the "same act or omission" as the claim filed with the Board of Claims. *White by Swafford v. Gerbits*, 860 F.2d 661 (6th Cir. 1988) (interpreting T.C.A. §9-8-307(b) relying on the interpretation of a similar statute in *Leaman v. Ohio Dept. of Mental Retardation & Developmental Disabilities*, 825 F.2d 946 (6th Cir. 1987)).

Additionally, T.C.A. §8-42-103 makes provision for the State to provide defense counsel to a state employee when a lawsuit is brought against that state employee, and T.C.A. §9-8-112 authorizes the Board of Claims to pay final judgments obtained against state employees in civil lawsuits.

When read together, T.C.A. §8-42-103, §9-8-307(b), §9-8-112 and the qualifying phrase, "for purposes of this chapter," in §9-8-307(h) along with the legislative history set out above, the absolute immunity afforded state officers and employees by T.C.A. §307(h) applies only to claims for which the State has waived its immunity.[24] "A presumption exists that statutes are not repealed by implication because the Legislature 'is presumed to have knowledge of the state of the law on the subject under consideration at the time it enacts legislation.'" *Jenkins v. Loudon County*, 736 S.W.2d 603, 608 (Tenn. 1987), *quoting Equitable Life Assurance Co. v. Odle*, 547 S.W.2d 939, 941 (Tenn. 1977). Therefore, the

---

[24]T.C.A. §9-8-307(a)(1)(A)-(U).

individual-capacity Defendants' motion to dismiss Plaintiff's claim for negligent infliction of emotional distress must be denied.

In the alternative, and in the event the Court interprets T.C.A. §9-8-307(h) as providing the individual-capacity Defendants with absolute immunity, the Court must first make a determination that these Defendants were acting "within the scope of the officer's or employee's office or employment." There is no case law delineating the procedure to be followed by the Court in making this determination under T.C.A. §9-8-307(h). However, by analogy, Plaintiff directs the Court to case law on the scope-of-employment issue arising under the Federal Tort Claims Act. *Nasuti v. Scannell*, 906 F.2d 802, 805, 813 (1st Cir. 1990) (Where facts underlying the scope-of-employment issue are disputed, the court must make an independent ruling on the issue applying law of *respondeat superior* of the state where the conduct occurred.); *McHugh v. University of Vermont*, 966 F.2d 67, 74 (2nd Cir. 1992)("[A] plaintiff is entitled to a due process hearing on whether the federal employee was acting within the scope of employment."); *Melo v. Hafer*, 912 F.2d 628, 641 (3rd Cir. 1990, *aff'd on other grounds*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991)(When positions of the parties on the scope-of-employment issue differ, the court must decide the issue.); *Hamrick v. Franklin*, 931 F.2d 1209, 1211 (7th Cir.), *cert. denied* 502 U.S. 869, 112 S.Ct. 200, 116 L.Ed. 2d 159 (1991)(The court cannot merely accept the Attorney General's certification and not provide judicial review when scope of employment is disputed.); *Brown v. Armstrong*, 949 F.2d 1007, 1011 (8th Cir. 1991)(The court must "conduct at least minimal judical review" of scope-of-employment certification prior to granting substitution.); *Meridian Int'l. Logistics, Inc. v. United States*, 939 F.2d 740, 745 (9th Cir. 1991) (The court "may review the Attorney General's scope determinations."); *S. J. & W. Ranch, Inc. v. Lehtimen*, 913 F.2d 1538, 1542 (1990), *modified*, 924 F.2d 1555 (11th Cir.), *cert. denied*, 502 U.S. 813, 112 S.Ct. 62, 116 L.Ed.2d 37 (1991)("[O]nce in federal court a plaintiff is entitled to litigate the question of whether the employee was acting within the scope of his employment when the challenged conduct

occurred."); *Kimbro v. Velten*, 30 F.3d 1501, 1508 (D.C.Cir. 1994), *cert. denied*, __ U.S. __, 115 S.Ct. 2584, 132 L.Ed.2d 833 (1995)(Where necessary, the court must conduct "an evidentiary hearing to determine the scope of employment decision."). The United States Supreme Court has recently addressed the issue of judicial review of scope-of-employment certifications. *Gutierrez de Martineq v. Lamagno*, __ U.S. __, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995). Importantly, the *Gutierrez* court notes "our system of law has always endeavored to prevent even the probability of unfairness." *Id.* at 2233, *quoting In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) (Black J.).

The law of the State of Tennessee on *respondeat superior* must be applied by the Court to determine whether these Defendants were acting in the scope of their office and employment. The law of the State of Tennessee is set forth as follows:

> [U]ltimately the issue for determination by the Court is whether, from all of the evidence, it is made to appear that the employee at the time of the act was doing for his employer what he had been directed to do and whether he was engaged at the time in the performance of a service which was a contemplated or foreseeable incident of his employment.

Frazier, 273 F.Supp. at 150-51. If the employee's act was not done to further the employer's business, it was not done in the scope of employment. *Frazier*, 412 F.2d at 23. "[A]n employee's unauthorized act is not within the scope of his employment if it is done for personal purposes and is neither incident to, nor in furtherance of, the employer's business." *Id.*[25]

---

[25]Plaintiff would challenge that the conduct of the individually-named Defendants was incident to or in furtherance of the business of the University of Tennessee.

Thus, Plaintiff respectfully urges the Court to adopt the reasoning and procedures of these cases to determine whether the individual-capacity Defendants were acting in the scope of their office or employment. Additionally, Plaintiff would move the Court pursuant to Rule 56(f), F.R.C.P., to defer ruling on whether these Defendant were acting in the scope of their employment until discovery is conducted on this issue.

B. Intentional Infliction of Emotional Distress.

Defendants state that "plaintiff's claim of intentional infliction of emotional distress is based on a purely conclusory allegation of malice," and that Plaintiff fails to set forth "specific factual allegations supporting an inference of malice." (Defendants' Memorandum at p. 20).

Plaintiff alleges the conduct of the individual-capacity Defendants was done "**intentionally**, maliciously and **with reckless disregard.**"[26] (emphasis added) (Plaintiff's Complaint at p. 17, ¶77). "A person acts maliciously when the person is motivated by ill will, hatred, or personal spite." *Hodges v. S.C. Toof & Company*, S.W.2d (Tenn. 1992). Plaintiff has set forth numerous facts to support his claim that the Defendants' conduct was done maliciously. (Plaintiff's Complaint at pp. 6-17).[27]

Plaintiff's Complaint conforms to the notice pleading requirements of Rule 8, F.R.C.P. Further, Plantiff's Complaint conforms to Rule 9(b), F.R.C.P, which states, in part, "**[m]alice**, intent, knowledge, and other condition of mind of a person may be averred generally." (emphasis added). Defendants have not directed the Court to any case law sup-

---

[26]Defendants are only seeking dismissal on Plaintiff's claim that the conduct of the individual-capacity Defendants was done maliciously. Thus, Plaintiff is only required to and will respond only to Defendants' argument relating to malice.

[27]The facts are incorporated into Count IV through ¶76. (Plaintiff's Complaint at p. 17).

porting their argument that claims alleging malice must be pled more specifically than Plaintiff has done.[28]

To the extent Defendants are relying on their T.C.A. 9-8-307(h) absolute immunity defense, Plaintiff relies on his arguments set forth in his reply to the negligent infliction of emotional distress argument. *Supra.*

Thus, Defendant's motion to dismiss Plaintiff's claim for intentional infliction of emotional distress as it pertains to "malice" must be denied.

CONCLUSION

For the reasons set forth herein, Defendant Motion to Dismiss for failure to state a claim upon which relief may be granted must be denied.

For the reasons set forth herein, Defendant Rice's and Johnson's Motion for Summary Judgment must be denied.

Respectfully Submitted,

KIRKPATRICK, MOORE
& WESTBROOK

/s/

Connie Westbrook #13997
100 North Main Building
Suite #2900
Memphis, Tennessee 38103
(901) 523-2161

CERTIFICATE OF SERVICE

---

[28]Counsel for Plaintiff has not been able to find any case law requiring a more specific pleading than that submitted by Plaintiff. Plaintiff requests leave to amend his Complaint in the event the Court determines more specificity is required.

I, Connie Westbrook, hereby certify that I have served a copy of the foregoing Plaintiff's Memorandum in Response to Defendants' Motion to Dismiss and/or For Summary Judgment on Mr. Odell Horton, Jr., Attorney for Defendants, 847 Monroe Avenue, Suite 241, Memphis, Tennessee 38163, by first class United States mail, postage prepaid, this 19th day of June, 1996.

/s/
Connie Westbrook

APPENDIX H -- DEFENDANTS' REPLY MEMORANDUM OF LAW FILED JULY 30, 1996

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

SAMAD SALEHPOUR,

Plaintiff,

vs. NO. 96 2217 D

UNIVERSITY OF TENNESSEE; JOSEPH E. JOHNSON, in his official capacity as President of the University of Tennessee and in his individual capacity; WILLIAM R. RICE, in his official capacity as Chancellor of the University of Tennessee and in his individual capacity; WILLIAM F. SLAGLE, in his official capacity as Dean of the University of Tennessee College of Dentistry and in his individual capacity; WILLIAM F. BOWLES, III, in his individual capacity; VICTOR A FLETCHER, in his individual capacity; DENIS P. LYNCH, in his individual capacity; JOE M. GOSS, in his individual capacity; MARK R. PATTERS, in his individual capacity; MORRIS L. ROBBINS, in his individual capacity; JIMMY E. ALBRIGHT, in his individual capacity; HARRY K. SHARP, in his individual capacity; ROLF G. BEHRENTS, in his individual capacity;

RUSSELL GILPATRIC, in his individual capacity; HARRY H. MINCER, in his individual capacity; BEN R. HIPP, in his individual capacity; MARJORIE A. WOODS, in her individual capacity; CHARLES SMITH, in his individual capacity; ROBERT G. KEIM, in his individual capacity; VAN T. HIMEL, in his individual capacity; and BETTIE T. PUCKETT, in her official capacity as Director of Affirmative Action and in her individual capacity,

Defendants.

DEFENDANTS' REPLY BRIEF

INTRODUCTION

Plaintiff's response to defendants' Motion to Dismiss or For Summary Judgment concedes the following points in defendants' favor:

1. Plaintiff did not intend to allege a claim against the University or University officials in their official capacities under state law. (Plaintiff's Memorandum at 5.)

2. The University and University officials in their official capacities are not subject to suit for monetary damages under § 1983. (Plaintiff's Memorandum at 6.)

3. University officials are not subject to suit in their individual capacities under Title VI, the Rehabilitation Act, or the Americans with Disabilities Act. (Plaintiff's Memorandum at 11.)

4. The complaint does not allege that plaintiff gave notice of his disability to defendants. (Plaintiff's Memorandum at 10.)

In light of these concessions by plaintiff, the Court can dismiss the following claims without further consideration:

1. all state law claims against the University and University officials in their official capacities;

2. all §§ 1981[1] and 1983 claims for monetary damages against the University and University officials in their official capacities;

3. all claims against University officials in their individual capacities under Title VI, the Rehabilitation Act, and the Americans with Disabilities Act; and

4. all disability discrimination claims under the Rehabilitation Act and the Americans with Disabilities Act.

SUMMARY OF ARGUMENT

With respect to the remaining grounds supporting defendants' Motion to Dismiss, plaintiff has erroneously responded as if defendants were seeking a more definite statement under Rule 12(e). In fact, however, defendants' Rule

---

[1]Plaintiff has no private right of action directly under § 1981 against *state* actors. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-33, 109 S. Ct. 2702, 2721-22, 105 L. Ed. 2d 598 (1989). An action for violation of § 1981 by state actors can only be brought under § 1983. Therefore, by conceding that the University and University officials in their official capacities are not "persons" subject to suit for monetary damages under § 1983, plaintiff necessarily concedes that he cannot bring a § 1981 claim for damages against the University and University officials in their official capacities. (Argument II below establishes that plaintiff's § 1981 claim cannot be brought against the University itself under § 1983 even for prospective injunctive relief.

12(b)(6) motion takes the position that the *facts* (as opposed to bare conclusions) alleged by plaintiff–considered in the light most favorable to plaintiff and with all *reasonable* inferences drawn in plaintiff's favor–fail to state a claim upon which relief can be granted. Thus, plaintiff has not merely made a "technical" error by failing to plead some existing fact essential to recovery. To the contrary, plaintiff has alleged all the facts he can allege,[2] but those facts are insufficient to state a claim for relief because, for the reasons listed below, they do not establish the material elements essential to recovery under the Rehabilitation Act, the Americans with Disabilities Act, Title VI, § 1981, § 1983, or state common law.

Rehabilitation Act and ADA claims of disability discrimination. The complaint does not allege facts showing that plaintiff gave defendants notice of his alleged disability. Nor does the complaint allege facts showing that plaintiff's alleged physical impairment "substantially limits" a major life activity.

§ 1981 and Title VI claims of national origin discrimination. The complaint does not allege facts showing that similarly situated students were treated more favorably than plaintiff. Furthermore, even if the complaint were sufficient to state a claim on the merits under § 1981, it is insufficient to defeat the qualified immunity of the University officials.

§ 1983 claim of due process violation. The complaint does not allege facts showing that plaintiff suffered any deprivation of a property or liberty interest. Furthermore, even if the complaint were

---

[2]Despite the great length of the complaint in this case, this entire dispute is over a letter of reprimand placed in plaintiff's academic record for his refusal to comply with a classroom rule against sitting on the back row. The complaint does not and cannot allege that defendants ever dismissed him from the College of Dentistry. To the contrary, plaintiff voluntarily withdrew from the College on May 8, 1995. (Affidavit of Rice ¶ 5.) The complaint does not and cannot allege that defendants have denied plaintiff readmission to the College.

sufficient to state a claim on the merits, it is insufficient to defeat the qualified immunity of the University officials.

§ *1983 claim of a First Amendment violation.* The complaint does not allege facts showing that plaintiff would not have received the letter of reprimand "but for" the exercise of constitutionally protected speech. Furthermore, even if the complaint were sufficient to state a claim on the merits, it is insufficient to defeat the qualified immunity of the University officials.

State law claims of intentional and negligent infliction of emotional distress. The complaint does not allege facts showing that the University officials acted outside the scope of their employment or with malice and thus does not defeat their absolute immunity under state law.

The Sixth Circuit has recognized that although the standard of review for a Rule 12(b)(6) motion is liberal, a complaint "'must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory.'" *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988) (citations omitted). Therefore, "'when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.'" *Id.* At 437 (citation omitted).

For this reason, defendants vigorously oppose plaintiff's repeated requests for leave to amend the complaint. Plaintiff has already amended the complaint once. To allow him to amend again–after defendants have incurred the substantial time and expense to file a dispositive motion and before the Court rules on that motion–would be unduly prejudicial to defendants' right to challenge the legal sufficiency of the complaint under Rule 12(b)(6).

Furthermore, the Sixth Circuit has adopted a "heightened standard of pleading" when the defense of qualified immunity

is raised in a motion to dismiss a § 1983 action against state officials.[3] *Veney v. Hogan*, 70 F.3d 917, 921 (6th Cir. 1995). The *Veney* court described the purpose of the heightened standard as follows:

> "[t]he heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls."

Veney, 70 F.3d at 921 (quoting Justice Kennedy's concurring opinion in *Siegert v. Gilley*, 500 U.S. 226, 236, 111 S. Ct. 1789, 1795, 114 L. Ed. 2d 277 (1991)). The Sixth Circuit further observed that even Rule 8 "envisions a 'statement of circumstances, occurrences, and events in support of the claim presented. . . .[T]he complaint must disclose information with sufficient definiteness.'" *Id.* at 921-22 (quoting 5 C. Wright & A. Miller, *Federal Practice & Procedure Civil* 2d § 1201 n.11 (1990)). Under the heightened standard applicable to claims against state officials, the Sixth Ciruit held that the complaint must

> include the specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, if proved, will overcome the defense of qualified immunity.
>
> . . .
>
> The promise of early exit from a lawsuit offered by qualified immunity is an empty promise if plaintiffs are routinely permitted to survive a motion to dismiss with mere "notice" pleading.

---

[3]Therefore, the heightened standard necessarily applies to a § 1981 claim brought against state officials under § 1983.

Veney, 70 F.3d at 922. Thus, even if the Court were to find the complaint in this case sufficient to withstand defendants' Rule 12(b)(6) motion on the merits, the complaint is nevertheless insufficient to defeat the qualified immunity of University officials in their individual capacities.

With respect to defendants' alternative Motion for Summary Judgment as to the claims against defendants Rice and Johnson in their individual capacities, plaintiff has failed to meet his burden under Rule 56(e) to come forward with specific facts, *by affidavit or as otherwise provided by Rule 56*, disputing the testimony of Rice and Johnson that they did not encourage or otherwise directly participate in the specific acts that allegedly violated plaintiff's rights under federal law. Because of plaintiff's reckless use of broad and conclusory allegations against *all* defendants corporately (*see especially* Complaint ¶¶ 42, 43,57, 60, and 61), Chancellor Rice and President Johnson had to present affidavit testimony to demonstrate their lack of personal involvement in the allegedly unlawful conduct. Plaintiff's response fails to meet his burden under Rule 56(e) both procedurally and substantively.

Procedurally, plaintiff's response is not made by affidavit or as otherwise provided by Rule 56. Therefore, the documents submitted by plaintiff are not properly before the Court, and the Court should strike them from the record and not consider them in ruling on defendants' motion. Substantively, for the reasons explained in the following argument, plaintiff's response fails to satisfy the Rule 56(e) requirement of setting forth specific facts showing that there is a genuine issue for trial concerning whether defendants Rice and Johnson encouraged or directly participated in the specific acts that allegedly violated plaintiff's rights.

ARGUMENT

I. Plaintiff has failed to set forth specific facts showing that defendants Rice and Johnson encouraged or otherwise directly participated in the specific acts that allegedly violated plaintiff's rights.

Plaintiff's response to the affidavit testimony of Chancellor Rice and President Johnson consists of nothing but the documents allegedly reviewed by Chancellor Rice and President Johnson in acting on plaintiff's *voluntary and discretionary appeals* to them. None of these documents disputes the affidavit testimony of Chancellor Rice and President Johnson that they did not encourage, direct, or authorize the specific acts that allegedly violated plaintiff's rights. Nor do these documents offer any contradiction to the fact--apparent on the face of the complaint--that the allegedly unlawful acts occurred *prior* to plaintiff's appeals to Chancellor Rice and President Johnson.

Therefore, the *undisputed* fact is that Chancellor Rice and President Johnson did not encourage or directly participate in the specific acts that allegedly violated plaintiff's rights. In addition, the *undisputed* fact is that Chancellor Rice and President Johnson did not even have knowledge of the allegedly unlawful acts "at the time they occurred or allegedly occurred. . . ." (Affidavit of Rice at ¶ 8; Affidavit of Johnson at ¶ 6) Plaintiff's response grossly mischaracterizes Chancellor Rice's testimony by stating that "he claims to have absolutely no knowledge" of the allegedly unlawful acts even though he "was in receipt of Plaintiff's letters with enclosures . . ." (Plaintiff's Memorandum at 8.) In truth, however, Chancellor Rice testified that he had no knowledge of the acts "at the time they occurred or allegedly occurred. . . ." (Affidavit of Rice at ¶ 8.) The *undisputed* fact is that Chancellor Rice did not receive plaintiff's letters with enclosures until *after* the allegedly unlawful acts had occurred.[4]

---

[4]Plaintiff's request for "additional time to conduct discovery on the issue of Defendant Rice's participation in the denial of Plaintiff's statutory rights" (Plaintiff's Memorandum at 9) should be denied because it fails to comply with the requirements of Rule 56(f). Plaintiff did not file an affidavit showing why he cannot oppose defendant Rice's motion for summary judgment by affidavit. Indeed, if plaintiff had any "evidentiary support" for suing Chancellor Rice and President Johnson in their personal capacities, "formed after an inquiry reasonable under the circumstances," Fed. R. Civ. P. 11(b), he should have presented those supporting facts by affidavit or ex-

Plaintiff concedes that Chancellor Rice and President Johnson cannot be held liable in their individual capacities under the theory of *respondeat superior*. By conceding this point, plaintiff necessarily concedes the well-established corollary that personal liability under § 1983 must be based on a showing that the individual defendant "encouraged the specific incident of misconduct or in some other way directly participated in it." *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir.), *cert. denied*, 469 U.S. 845, 105 S. Ct. 156, 83 L. Ed. 2d 93 (1984). The mere failure to act and the mere right to control the acts of subordinates are not sufficient to establish personal liability under § 1983. *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1989), *cert. denied*, 495 U.S. 932, 110 S. Ct. 2173, 109 L. Ed. 2d 502 (1990); *Bellamy*, 729 F.2d at 421. Plaintiff has cited no authority to the contrary. Yet he attempts to hold Chancellor Rice and President Johnson liable for monetary damages in their personal capacities merely because they failed to reverse the allegedly unlawful *prior* acts of other University officials.[5] Under Plaintiff's theory, Chancellor Rice and President Johnson are liable in their personal capacities simply because they learned about plaintiff's claim of allegedly unlawful acts after the fact of those acts and did not take the action plaintiff wanted. Under the Sixth Circuit's *Bellamy* standard--encouraging or otherwise directly participating in the specific incident of unlawful conduct--the mere failure to provide redress for the allegedly unlawful acts of others is unmistakably insufficient to create personal liability under § 1983. *See Copeland v. Machulis*, 57 F.3d 476, 481 (6th Cir.

---

plained by affidavit why he could not do so.

[5]Defendants are uncertain what point plaintiff is attempting to make with his assertion that "he would not have been afforded an appeal to either Defendant [Rice or Johnson]," if he had been given a hearing under the Tennessee Uniform Administrative Procedures Act.. (Plaintiff's Memorandum at 12.) In any event, plaintiff's assertion is not true. In fact, Chancellor Rice, as the "agency head," would have entered the "final order" in a TUAPA proceeding under Tenn. Code Ann. § 4-5-315(b) (1991). In addition, nothing in the documents referenced by plaintiff supports his claim that he could not have appealed the Chancellor's final order under the TUAPA to President Johnson.

1995); *Knop v. Johnson*, 977 F.2d 996, 1014 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1415, 122 L. Ed. 2d 786 (1993); *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S. Ct. 788, 102 L. Ed. 2d 780 (1989).

Therefore, Chancellor Rice and President Johnson are entitled to summary judgment on plaintiff's claims against them in their individual capacities under §§ 1981[6] and 1983 because plaintiff has failed to set forth, by affidavit or as otherwise provided by Rule 56(e), specific facts showing that they encouraged or otherwise directly participated in the specific acts of allegedly unlawful conduct. Furthermore, in light of plaintiff's concession that the individual defendants are not liable in their individual capacities under Title VI, the Rehabilitation Act, or the ADA, Chancellor Rice and President Johnson are entitled to summary judgment or dismissal of all claims against them in their individual capacities.

II. The University of Tennessee is not subject to suit under § 1981.

Regardless of the nature of relief sought by plaintiff, this Court lacks subject matter jurisdiction over plaintiff's § 1981 claim against The University of Tennessee. Plaintiff has conceded that the University and University officials in their official capacities are not "persons" subject to suit for monetary damages under § 1983. Therefore, because a § 1981 claim can only be brought against state actors under § 1983, *see* n.1 *supra*, plaintiff's § 1981 claim for damages cannot be maintained against the University or University officials in their official capacities.

---

[6]Plaintiff's § 1981 national origin discrimination claim can only be brought against these state defendants under § 1983. There is no private right of action against state actors directly under § 1981. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-33, 109 S. Ct. 2702, 2721-22, 105 L. Ed. 2d 598 (1989). Therefore, because Chancellor Rice and President Johnson did not have the personal involvement required for personal liability under § 1983, they are entitled to judgment in their favor on the discrimination claim as well as the First and Fourteenth Amendment claims.

Furthermore, the exception that allows § 1983 suits for prospective injunctive relief against state officials in their official capacities has no application to a suit against a state entity like The University of Tennessee. The Eleventh Amendment is an absolute bar to a federal court action against a state and state instrumentalities, regardless of the nature of the relief sought. *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S. Ct. 3057, 56 L. Ed. 2d 1114 (1978). Plaintiff's attempt to avoid the bar of the Eleventh Amendment by relying on the University's status as a "legal entity" is feeble at best. Plaintiff cites no authority in opposition to the cases cited by defendants holding that the University is an arm and *alter ego* of the State of Tennessee and entitled to the state's Eleventh Amendment immunity from suit in federal court. (Defendants' Memorandum of Law at 4.) Plaintiff also ignores the explicit stipulation of state law that "[n]o statutory or other provision authorizing the University of Tennessee and its board of trustees to sue and be sued shall constitute a waiver of sovereign immunity." Tenn. Code Ann. § 20-13-102(b) (1994).

Therefore, the Court should dismiss plaintiff's entire § 1981 claim against the University for lack of subject matter jurisdiction.

III. Even if plaintiff had given notice of his alleged disability, the complaint nevertheless would fail to state a claim under the Rehabilitation Act and the ADA because plaintiff does not have a "disability" within the meaning of those statutes.

Plaintiff has conceded that his complaint includes no allegations of fact showing that he gave notice of his alleged disability to defendants. (Plaintiff's Memorandum at 10.) Plaintiff's failure to give defendants notice absolutely precludes his recovery under the Rehabilitation Act and the ADA because he cannot prove that any action was taken against him "solely by reason of . . . his disability." 29 U.S.C. § 794(a). (Additional points and authorities appear in Defendants' Memorandum of Law at 9-11). Thus, even under the most liberal application of the Rule 12(b)(6) standard of review, the absence of any allegation of fact concerning notice requires dismissal of

plaintiff's disability discrimination claims. The Court may fairly assume that plaintiff's failure to allege this fact so essential to recovery means that the fact does not exist. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 437 (6th Cir. 1988).

Furthermore, even if plaintiff could show that he had given defendants notice of his alleged disability, the complaint nevertheless fails to allege facts showing that plaintiff is an "individual with a disability" within the meaning of the Rehabilitation Act and the ADA. The complaint includes nothing but meager facts concerning an alleged physical impairment. (Complaint ¶ 28.) Those allegations are insufficient to meet the statutory definition of "disability," which is "a physical . . . impairment which [that] substantially limits one or more . . . major life activities. . . ." 29 U.S.C. § 706(8)(B); 42 U.S.C. § 12102(2)(A). Regulations implementing the ADA define the term "substantially limits" as follows:

> Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity *as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.*

29 C.F.R. § 1630.2(j)(1)(ii) (emphasis added). Plaintiff has alleged no facts allowing even an inference that his alleged physical impairment significantly restricts a major life activity "as compared to . . . the average person in the general population . . . ." *Id.* In the absence of these essential facts, plaintiff cannot prove that he is entitled to any relief.[7] Therefore, the Court should dismiss plaintiff's claims under the Rehabilitation

---

[7]The trivial nature of plaintiff's disability discrimination claim is revealed by the fact that the dispute is over plaintiff's insistence upon sitting on the last row rather than the next-to-last row of the classroom. The only reasonable inference to be drawn from the facts alleged is that plaintiff could have sat on the next-to-last row and that doing so would have reasonably accommodated his alleged physical impairment.

Act and the ADA for failure to state a claim upon which relief can be granted.[8]

IV. The complaint fails to state a claim of national origin discrimination under § 1981 and Title VI because it does not allege facts showing that defendants treated plaintiff differently than similarly situated persons because of his national origin.

To state a claim of national origin discrimination under § 1981 and Title VI, plaintiff must allege specific facts supporting a reasonable inference that, because of his national origin, he was intentionally treated less favorably than students who were similarly situated to plaintiff in all respects. *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir. 1989) (To withstand a Rule 12(b)(6) motion on a § 1981 claim, the "appellants' obligation was to identify and relate specific instances where persons situated similarly 'in all relevant aspects' were treated differently . . . [citations omitted]"); *cf Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992).

Plaintiff, however, has alleged no specific facts showing that defendants treated him differently than students of other national origins who "engaged in the same conduct without . . . differentiating or mitigating circumstances." *Mitchell*, 964 F. 2d at 583. Plaintiff's response to defendants' motion does not deny this absence of facts concerning similarly situated students who were treated more favorably. (Plaintiff's Memorandum at 7 n.6.) Thus, in the absence of these allegations of fact essential to recovery, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.

---

[8]Plaintiff's retaliation claim under the ADA consists of nothing but a purely conclusory allegation. (Complaint ¶ 73.) Conclusory allegations, unsupported by specific factual allegations, fail to state a claim upon which relief can be granted. *Lillard v. Shelby County Board of Education*, 76 F.3d 716, 726 (6th Cir. 1996). Thus, plaintiff has failed to state a claim of retaliation because he has not alleged specific facts showing a causal connection between plaintiff's alleged "opposition" and any adverse action against him.

Ct. 99, 102, 2 L. Ed. 2d 80 (1957). Therefore, the Court should dismiss plaintiff's § 1981 and Title VI claims for failure to state a claim upon which relief can be granted.[9]

V. The complaint fails to state a claim for violation of procedural due process because it does not allege facts showing that plaintiff was deprived of a constitutionally protected property or liberty interest.

The only interest plaintiff offers as "property" within the meaning of the Fourteenth Amendment is his alleged right to a certain form of procedure under the Student Handbook. (Plaintiff's Memorandum at 13.) In *Purisch v. Tennessee Technological University*, 76 F.3d 1414, 1423 (6th Cir. 1996), however, the Sixth Circuit held that failure to follow a university's own procedures does not implicate constitutional due process. Thus, the fact that defendants did not offer plaintiff a hearing under the Tennessee Uniform Administrative Procedures Act does not constitute a deprivation of property without due process.[10]

Plaintiff did not and cannot allege that defendants dismissed him from the College of Dentistry. Plaintiff did not and cannot allege that defendants published to a third party any stigmatizing statements about plaintiff in conjunction with dismissal from the College or otherwise. Therefore, it appear-

---

[9]Even if the Court were to find the complaint sufficient to state a claim of national origin discrimination, it is nevertheless insufficient to defeat the qualified immunity of the University officials in their individual capacities. *See* Argument VII below.

[10]Furthermore, the Eleventh Amendment bars this Court from ordering state officials to conform their conduct to state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117, 104 S. Ct. 900, 917, 79 L. Ed. 2d 67 (1984). Thus, the Eleventh Amendment bars any judgment ordering defendants to provide plaintiff a hearing under the Tennessee Uniform Administrative Procedures Act or "in accordance with the written policies and procedures of the University of Tennessee College of Dentistry . . ." (Complaint, Prayer for Relief ¶ 6).

ing beyond doubt that plaintiff cannot prove any set of facts that would entitle him to recover for deprivation of a liberty or property interest, the Court should dismiss plaintiff's due process claim for failure to state a claim upon which relief can be granted.[11]

VI. The complaint fails to state a claim for violation of the First Amendment because it does not allege facts showing that adverse action was taken against plaintiff in retaliation for the exercise of protected speech.

The complaint fails to include factual allegations that would allow even an inference of a causal connection between any constitutionally protected speech and adverse action against plaintiff. To the contrary, the complaint shows a causal connection between plaintiff's deliberate violation of the classroom rule against sitting on the back row and his receipt of the letter of reprimand at issue in this case. (Complaint ¶¶ 29, 32.) To state a First Amendment claim, plaintiff bears the burden of proving that the letter of reprimand would not have been issued "but for" his exercise of constitutionally protected speech. *Cf. Mt. Health City Sch. Dist. Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576, 50 L. Ed. 2d 471 (1977). The complaint alleges no facts that would allow even an inference that the letter of reprimand would not have been issued "but for" plaintiff's opposition to the back row rule in the course of his deliberate violation of the rule.

Furthermore, plaintiff's First Amendment rights within an academic classroom are not absolute. Speech that results in "substantial disruption of or material interference with school activities, . . . disturbances or disorders on the school premises . . ." is not protected by the First Amendment. *Tinker v. Des Moines Indep. Com. Sch. Dist.*, 393 U.S. 503, 514, 89 S. Ct. 733,

---

[11]In any event, defendants provided plaintiff all the process due under the Fourteenth Amendment, including notice and more than one opportunity for a hearing. (Points and authorities appear in Defendants' Memorandum of Law at 18-19).

740, 21 L. Ed. 2d 731 (1969). The only reasonable inference that can be drawn from the facts alleged is that plaintiff's conduct–whether in violating the rule, opposing the rule, or both–resulted in substantial disruption of or material interference with the educational experiences of other students. (Complaint ¶ 53.)

Therefore, it appearing beyond doubt that plaintiff cannot prove that defendants issued the letter of reprimand in retaliation for plaintiff's exercise of constitutionally protected speech, the Court should dismiss plaintiff's First Amendment claim for failure to state a claim upon which relief can be granted.

VII. The University officials are entitled to qualified immunity because their alleged conduct did not violate any clearly established right.

Even if the Court were to find the complaint minimally sufficient to state a claim under §§ 1981 and 1983,[12] the University officials are nevertheless entitled to qualified immunity in their individual capacities because their alleged conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). This formulation of qualified immunity "recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." *Davis v. Scherer*, 468 U.S. 183, 195, 104 S. Ct. 3012, 3019, 82 L. Ed. 2d 139 (1984).

Plaintiff's only response to this defense is the assertion of the general rights of due process and freedom of speech. (Plaintiff's Memorandum at 15.) Citing the Supreme Court's decision in *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 3038-39, 97 L. Ed. 2d 523 (1987), however, the Sixth Circuit

---

[12]"The trial court need not deny a defendant the right to qualified immunity simply because a complaint adequately alleges violation of clearly established law." *Veney v. Hogan*, 70 F.3d 917, 920 (6th Cir. 1995).

has held that "for a right to be clearly established it must have been articulated with a significant degree of particularity . . . ." *Eugene D. by and through Olivia D. v. Karman*, 889 F.2d 701, 706 (6th Cir. 1989), *cert. denied*, 496 U.S. 931, 110 S. Ct. 2631 110 L. Ed. 2d 651 (1990).

Applying the *Anderson* particularity requirement in *Garvie v. Jackson*, 845 F.2d 647, 650 (6th Cir. 1988), the Sixth Circuit held that the general assertion of free speech and due process rights is insufficient to defeat a claim of qualified immunity. Instead, the court considered "whether reasonably competent officials could have disagreed" on whether the plaintiff's speech was protected by the First Amendment and whether he had a property interest entitled to due process protection. *Id.* at 650-51. In other words, the particularity requirement demands an inquiry into whether reasonable officials could disagree on the law's application to the particular circumstances confronting an official. *See Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986) ("if officers of reasonable competence could disagree on this issue, immunity should be recognized.") Thus, according to the Supreme Court, "where there is a legitimate question whether . . . [the official's conduct was unlawful], it cannot be said that . . . [the official] violate[d] clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12, 105 S. Ct. 2806, 2820 n.12, 86 L. Ed. 2d 411 (1985). Furthermore, under the heightened pleading requirement adopted by the Sixth Circuit in *Veney*, 70 F.3d at 922, the complaint must include "specific, non-conclusory allegations of fact" that establish a violation of clearly established rights.

The complaint in this case is wholly insufficient to defeat the qualified immunity of the University officials. At the very least, the Court must find that reasonable officials facing the facts alleged in the complaint could disagree on whether plaintiff's rights under § 1981, the First Amendment, and the Due Process Clause were implicated by their actions. At the very least, therefore, there is a "legitimate question" as to whether defendants' conduct violated clearly established rights.

With respect to the due process claim, the complaint does not and cannot allege that defendants brought dismissal pro-

ceedings against him. Thus, a reasonable official facing these circumstances could have believed that the notice and hearing afforded plaintiff in this case did not violate any clearly established due process right.[13] Plaintiff has cited no case law from the Supreme Court or the Sixth Circuit applying the generalized due process right alleged by plaintiff to circumstances even remotely similar to those alleged in the complaint. In other words, plaintiff has cited no authority that would have put defendants on notice that their conduct violated clearly established due process rights.

Likewise, a reasonable official could have believed that a letter of reprimand for deliberately violating a classroom rule and disrupting the classroom experience of other students did not implicate any clearly established free speech right. Plaintiff has cited no case law applying the generalized free speech right he alleges to circumstances even remotely similar to those alleged in the complaint. Furthermore, the complaint fails to meet the heightened pleading requirement of *Veney* because it does not include specific, non-conclusory allegations of fact. In *Veney*, the Sixth Circuit found a First Amendment claim insufficient to defeat qualified immunity because the complaint "fail[ed] to indicate the precise content and form of the complaints and challenges, the context in which they were made, and when and to whom they were made." *Veney*, 70 F.3d at 922. The *Veney* court also found the complaint insufficient for failing to ascribe the alleged "retaliation" to a particular defendant. These are precisely the failings of the complaint in this case. The plaintiff's First Amendment claim consists of nothing but a vague and conclusory allegation of retaliation aimed corporately at all defendants without any identification of particular acts of wrongdoing by particular defendants. (Complaint ¶ 58.) Therefore, under the required heightened standard of pleading, the complaint in this case manifestly fails to defeat the qualified immunity of the University officials.

Plaintiff's national origin discrimination claim also fails

---

[13]*See* Defendants' Memorandum of Law at 18-19 for points and authorities on the adequacy of the procedural due process plaintiff received.

to defeat qualified immunity in this case. Assertion of a general right against national origin discrimination is not enough to defeat qualified immunity. The complaint does not include specific, non-conclusory allegations of fact showing that plaintiff was treated differently than similarly situated students because of his national origin. Like the First Amendment claim, it fails to indicate the precise form and context of the lone other alleged incident of a back-row-rule violation. (Complaint ¶ 31.) Thus, the complaint fails to allege the specific facts necessary to show that University officials *intentionally* treated plaintiff differently because of national origin.

And finally, the Court surely must find the complaint insufficient to defeat the qualified immunity of Chancellor Rice and President Johnson. No reasonable official in their position would have believed that the mere failure to reverse the alleged prior acts of other officials would violate a clearly established right. Plaintiff has cited no authority that would have put Chancellor Rice and President Johnson on notice that their action in ruling on plaintiff's appeal violated plaintiff's clearly established rights.

Therefore, plaintiff having failed to defeat the University officials' qualified immunity, the Court should dismiss all claims against the University officials in their individual capacities.

VIII. The intracorporate conspiracy doctrine bars plaintiff's conspiracy claim because the University officials were acting within the scope of their employment and carrying out the duties of their offices.

Faced with the absolute bar of the intracorporate conspiracy doctrine, plaintiff seeks to avoid the bar by arguing that the Court must first determine that the University officials were acting in the scope of their employment. (Plaintiff's Memorandum at 16.) Plaintiff's argument completely ignores the fact that his complaint nowhere alleges that the individual University officials were acting *outside* the scope of their employment. Indeed, the only reasonable inference that can be drawn from

the complaint is that they were at all times acting within the scope of their University employment and carrying out the particular duties of their offices. (Complaint ¶¶ 1-22.)

Defendants vigorously oppose plaintiff's purported motion "pursuant to Rule 56(f)" (Plaintiff's Memorandum at 20) to conduct discovery on the scope of employment issue with respect to both the intracorporate immunity defense and the state law immunity defense. Defendants' motion with respect to the conspiracy and state law claims against the University officials in their individual capacities is a Rule 12(b)(6) motion for failure to state a claim--not a Rule 56 motion for summary judgment. Defendants' motion rests entirely on the complaint itself; defendants have not presented any matter outside the complaint in support of their motion on these grounds. Therefore, plaintiff is not entitled to conduct discovery on this issue. Furthermore, if plaintiff had any "evidentiary support" for an assertion that these defendants acted outside the scope of their employment, "formed after an inquiry reasonable under the circumstances," Fed. R. Civ. P. 11(b), he should have included that factual contention in his complaint.

Having failed to allege any facts showing that the individual defendants acted outside the scope of their employment, plaintiff cannot defeat the intracorporate conspiracy defense on that ground. Therefore, the Court should dismiss the conspiracy claim against the University officials in their individual capacities for failure to state a claim upon which relief can be granted.

IX. The absolute immunity of Tenn. Code Ann. § 9-8-307(h) bars all state law claims against the University officials in their individual capacities.

The absolute immunity of Tenn. Code Ann. § 9-8-307(h) (Supp. 1995) bars all state law claims against University employees--not just claims for which the State of Tennessee has waived its sovereign immunity. Plaintiff's argument on this point relies on an early version of § 9-8-307(h) that limited state employee immunity to claims falling with the jurisdiction of the Tennessee Claims Commission. The Tennessee Legislature

amended the immunity statute in 1985, however, and extended its application of all claims against state employees. As the Sixth Circuit explained in *Walker v. Norris*, 917 F.2d 1449, 1458 (6th Cir. 1990),

> [t]he legislature's elimination of the original language restricting absolute immunity to actions "falling within the parameters" of the Claims Commission Act inexorably leads us to the conclusion that the Tennessee legislature's amendment of section 9-8-307(h) extended absolute immunity to all claims against state officers and employees.

Therefore, the absolute immunity of § 9-8-307(h) applies to all of plaintiff's state law claims against the University officials in their individual capacities.

For the reasons stated in Argument VIII, plaintiff's position that the Court must first determine whether the University officials were acting within the scope of their employment does not defeat the absolute immunity defense. The only reasonable inference that can be drawn from the complaint is that these defendants were acting at all times within the scope of their employment and carrying out the duties of their offices. Therefore, the immunity of § 9-8-307(h) is an absolute bar to plaintiff's state law claim for negligent infliction of emotional distress.

Furthermore, plaintiff has not identified specific factual allegations that support his broad and conclusory allegation of malice on the part of all individual defendants. This conclusory allegation, without identification of specific acts of malice by specific defendants, is insufficient to defeat the absolute immunity of § 9-8-307(h).

Therefore, the Court should dismiss the state law claims against University officials in their individual capacities on the ground of their absolute immunity under Tenn. Code Ann. § 9-8-307(h) (Supp. 1995).

CONCLUSION

For the reasons stated above and in defendants' original Memorandum of Law, defendants request the Court to dismiss this action against all defendants on the following grounds:

1. Dismissal of all § 1981, § 1983, and state law claims against The University of Tennessee for lack of subject matter jurisdiction.

2. Dismissal of all § 1981, § 1983, and state law claims for damages against University officials in their official capacities for lack of subject matter jurisdiction.

3. Dismissal of all Title VI, Rehabilitation Act, and Americans with Disabilities Act claims against the University officials in their individual capacities for failure to state a claim upon which relief can be granted, there being no individual liability under those statutes.

4. Dismissal of all Title VI, Rehabilitation Act, and Americans with Disabilities Act claims against The University of Tennessee for failure to allege sufficient facts to state a claim upon which relief can be granted.

5. Dismissal of all § 1981 and § 1983 claims against University officials in their official capacities (prospective relief only) and in their individual capacities (damages) for failure to to allege sufficient facts to state a claim upon which relief can be granted.

6. If the Court finds the complaint sufficient to state a claim on the merits under §§ 1981 and 1983, dismissal of the claims for damages against the University officials in their individual capacites for failure to state a claim sufficient to defeat their qualified immunity.

7. Dismissal of all state law claims against University officials in their individual capacities for failure to state a claim sufficient to defeat their absolute im-

munity under Tenn. Code Ann. § 9-8-307(h).

With respect to the §§ 1981 and 1983 claims for damages against defendants Rice and Johnson in their individual capacities, defendants alternatively request the Court to enter summary judgment in their favor on the ground that there is no genuine issue of material fact concerning their lack of personal involvement in any unlawful act.

Respectfully Submitted,

Beauchamp E. Brogan
General Counsel
The University of Tennessee

BY: /s/
Odell Horton, Jr.
Associate General Counsel
847 Monroe Avenue
Suite 241
Memphis, Tennessee 38163
(901) 448-5615

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that I have mailed a copy of the foregoing Defendants' Reply Brief to Connie Westbrook, Esq., counsel for plaintiff, by first class mail this 30th day of July 1996.

/s/
Attorney for Defendants